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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 904

CHARLES R. NESBITT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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January, 1966

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SUBJECT INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Opinion of the Court of Claims	9
Genesis of the Development of the "Reiner Doctrine"	12
Reasons for Granting Writ	18
Conclusion	25

AUTHORITIES CITED

CASES:

Bakewell v. United States, 28 F.Supp. 504 (D.C. E.D. Mo. 1939), aff'd 110 F.2d 565 (8th Circuit 1940), cert. den. 310 U.S. 638 (1940) 20

Brown and Son Electric Co. v. United States, Ct. Cl. (Dec. 13, 1963), 325 F.2d 446 15, 17, 22

Broadbent Portable Laundries v. United States, 56 Ct. Cl. 128 21

Carleno Coal Sales v. Ramsey Coal Co., 129 Colo. 393, 270 P.2d 755 21

Coastal Cargo Company, Inc. v. U. S., Ct. Cl. (Oct. 15, 1965), 467-59, not yet officially reported (Appendix C, infra, page xli) 22

College Point Boat Corp. v. United States, 267 U.S. 12 11, 12, 13, 14, 15, 17, 18, 19

INDEX CONTINUED

PAGE

Elkhorn Consolidated Coal & Coke Co. v. Eaton Rhodes & Co., 163 Ky. 306, 173 S.W. 798 ____ 21

G. L. Christian & Associates v. United States, 312 F.2d 418, 320 F.2d 345, cert. den. (1963), 375 U.S. 954 ____ 22

Goldwasser v. United States (Dec. 13, 1963), 325 F.2d 722 ____ 15, 16, 21, 22

Holmes Electric Protective Co. v. Goldstein, 147 Pa. Super. 506, 24 A.2d 161 ____ 21

John Reiner & Co. v. United States, Ct. Cl. (Dec. 13, 1963), 325 F.2d 438, cert. denied, 377 U.S. 931 (1964) ____ 15, 16, 17-18, 21, 22

Klein v. United States, 285 F.2d 778 (1961) ____ 15, 16, 22

Lynch v. United States, 292 U.S. 571 ____ 20

Needles for the Use of Needles v. United States, 101 Ct. Cl. 535 ____ 21

Perry v. United States, 294 U.S. 330 ____ 20

Russell Motor Co. v. United States, 261 U.S. 514 ____ 12, 13

Star Chronicle Publishing Co. v. United Press Associations (1913 C.C.A. 8th), 204 Fed. 217, writ of error dismissed 1914, 232 U.S. 714, cert. den. 232 U.S. 721 ____ 20

Sylvan Crest Sand & Gravel Co. v. United States (C.C.A.2d), 150 F.2d 642 ____ 20

United States v. Dismuke, 76 F.2d 715 (5th Circuit 1935) ____ 20

United States v. Penn Foundry & Manufacturing Co., 337 U.S. 198 ____ 21, 24

United States v. Purcell Envelope Co., 249 U.S. 313 ____ 21

United States v. Spearen, 248 U.S. 132 ____ 21

Warrick v. McKnab's Estate, 164 Kans. 78, 187 P.2d 502 ____ 20-21

INDEX CONTINUED

PAGE

Wright v. Bristol P. Leather Co., 257 Pa. 552, 101 Atl. 844 ____ 21

STATUTES:

Act of March 3, 1887, as amended 24 Stat. 505, 28 U.S.C. 1346 ____ 20
Act of June 15, 1917, c. 29, 40 Stat. 182 ____ 12
Act of June 25, 1948, c. 646, 62 Stat. 940, 28 U.S.C.A. 1491 ____ 3, 4, 20
R.S. 161, Sec. 2202, 70A Stat. 120, 5 U.S.C. 22, 10 U. S. C. 2202, 70A Stat. 127-133, 10 U.S.C. 2301-2314 ____ 24
55 Stat. 838, 839, c. 593, 50 U.S.C.A., App'x Sec. 611 ____ 24
63 Stat. 390, Sec. 205(C), 40 U.S.C. 486(C) ____ 24
28 U.S.C.A. 1255(1) ____ 2

REGULATIONS:

32 C.F.R. 8.707, 8.709, 8.710 ____ 22
32 C.F.R. Sec. 8.000, 8.101-7, 8.101-11, Subpart B, 8.200, 8.201, 8.202, Subpart F, 8.600, 8.601, 8.602, 8.602-1, 8.602-2, 8.603, 8.603-1, Subpart G, 8.700, 8.701, 8.702, 8.703, 8.704, 8.704-1, 8.705-2, 8.707, 8.708, 8.709, 8.710 ____ 24
41 C.F.R. 1-8.701, 1-8.702, 1-8.703 ____ 22
41 C.F.R. 1-8.000, Subpart 1-8.1, 1-8.101, (f), (6), Subpart 1-8.2, 1-8.200, 1-8.201, 1-8.202, Subpart 1-8.6, 1-8.600, 1-8.601, 1-8.602, 1-8.602-1, 1-8.602-2, (a), Subpart 1-8.7, 1-8.700, 1-8.700-1, 1-8.700-2, 1-8.701, 1-8.702, 1-8.703, 1-8.704, 1-8.704-1, 1-8.705, 1-8.705-1, 1-8.705-2, 1-8.707, 1-8.708, 1-8.709, 1-8.709-1, 1-8.709-2, 1-8.710 ____ 24

MISCELLANEOUS:

5 Wayne Law Review 303, 309 ____ 24

PAGE

APPENDIX

Appendix A:

United States Statutes Indirectly Involved ——— i

Appendix B:

Report of Commissioner (Dec. 10, 1963) ——— ii-xv
Opinion and Findings of Fact of the Court of Claims (May 14, 1965) ——— xvi-xl
Order Denying Motion for Rehearing (Dec. 15, 1965) ——— xli-xliii

Appendix C:

Unreported Opinion, United States Court of Claims, Oct. 15, 1965, No. 467-59, Coastal Cargo Company, Inc. v. the United States ——— xliii-l

Excerpts From Special Analysis on Obligations by Objects, "Budget for Fiscal Year 1966," Executive Office of the President, Bureau of the Budget, June, 1965 ——— li-liii

In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

CHARLES R. NESBITT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Charles R. Nesbitt prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above cause on the 14th day of May, 1965.

CITATIONS TO OPINIONS BELOW

The Report of the Commissioner to whom this cause was referred for recommended findings of fact only (R. 40 to 51) is unreported and is printed in Appendix B hereto, *infra*, page iii. The opinion of the Court of Claims, inclusive of findings of fact by the Court of Claims (R. 188 to 207), is printed in Appendix B hereto, infra, page xvi, and is reported in 345 F.2d 583, without inclusion of the findings of fact made by that Court.

JURISDICTION

The judgment of the Court of claims was entered on the 14th day of May, 1965 (R. 188 to 207), (Appendix B, *infra*, page xvi). Rehearing was denied on October 15, 1965 (R. 322) (Appendix B, *infra*, page xli). The jurisdiction of this Court in invoked under the provisions of Title 28, U.S.C.A. 1255(1).

QUESTIONS PRESENTED

1. Where a government procurement contract contains a "termination for convenience of the government clause" permitting the Government, through its contracting agent, at its option, to terminate the contract in whole or in part by the giving of appropriate notice thereof and in such case to prohibit recovery by the contractor for loss of future profits resulting from such termination, does the mere presence of this clause in a government contract operate to prohibit a contractor from recovery of loss of profits resulting from a series of breaches of his contract, committed by the Government during a period in which his contract remained in full force and effect, in the absence of any attempt on the Government's part to invoke the clause in question and without any communication by the Government to the contractor of an intent or desire on the part of the Government to terminate his contract in whole or in part?

2. Where a contract vests in one party the right at that party's option to terminate the contract in whole or in part at any time, requiring only that such party give a

prescribed notice of such termination, partial or total, may the party having the benefit of such contractual right be held liable for his breaches of the contract occurring prior to his exercise of the option to terminate in the manner prescribed by the contract?

3. May the equitable doctrine, permitting one party who has terminated or cancelled a contract on legally insupportable grounds, to justify such action, where no inequity would result therefrom, at a later time upon the discovery of valid grounds therefor existing at the time of such termination be applied to permit such a party to avoid the consequences of his breaches of contract by the application of the legal fiction that prior to each such breach of contract such party will, as a matter of law, be treated as having exercised his contractual right of partially terminating the contract to the degree necessary, notwithstanding the absence of any attempt by, or intent of, such party to exercise his rights under such clause?

STATUTES INVOLVED

There are no statutory provisions directly involved in this appeal, although the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 940, 28 U.S.C. 1491, has indirect bearing herein. The same is printed in Appendix A, *infra*, page i.

STATEMENT

Plaintiff, hereinafter called "Nesbitt," filed his Petition (R. 1) in the Court of Claims August 14, 1961, alleging breaches by the Government of two (2) written contracts, hereinafter referred to as the "Eufaula Contract" and the

"Keystone Contract," Jurisdiction of this breach of government contract action on the part of the United States Court of Claims was invoked under the provisions of Title 28, U.S.C.A., Section 1491. The Government filed Answer (R. 34) December 12, 1962. The taking of evidence and testimony before the Commissioner began November 14, 1962 (see transcript, exhibits and reports on file with this Court as part of original record), and the Commissioner filed report of his recommended findings of fact on December 10, 1963 (R. 40) (Appendix B, *infra*, page iii). Nesbitt filed exceptions to this report March 19, 1964 (R. 52). On May 14, 1965, the Court of Claims filed its opinion in this cause (R. 188) (Appendix B, *infra*, page xvi). On June 14, 1965, Nesbitt filed motion for rehearing and alteration and amendment of judgment and brief in support thereof (R. 212), which motion the Court of Claims denied in order entered October 15, 1965 (R. 332) (Appendix B, *infra*, page xli).

The two contracts sued upon were entered into between Nesbitt and the Government in the Fall of 1956 and were supply contracts entirely on government forms, identical in form except as to the specified supply items and unit prices. The *Eufaula Contract* required Nesbitt to supply the Government, on an annual fiscal year basis, with its total requirements for title certificates and title insurance on tracts of land in three (3) specified Oklahoma counties as same were sought to be acquired by the Government in connection with its construction of the Eufaula dam and reservoir project. The *Keystone Contract* made similar requirements on the same basis for the supply by Nesbitt of such title material in connection with

acquisition of tracts of land by the Government in a specified county in connection with the contruction of the Keystone Dam and Reservoir Project. The contracts contain statements indicative of the Government's estimates of its probable tract acquisitions during each of the succeeding five (5) fiscal years for which each contract was to run, provided the Government at the end of each fiscal year gave notice of annual extension thereof. The Government, however, was to place its orders for title certificates only in the amount and at the times it required the same; Nesbitt being expressly obligated by the Agreements, thirty (30) days after order placements, to supply preliminary title certificates at a rate of not less than five (5) per week, where the Government's rate of order placement so required.

Both contracts (see Exhibits 2 and 3 Original Record) contain default clauses, see Clause 11, General Provisions, quoted in part in Court of Claims' Finding of Fact 7 (Appendix B, *infra*, page xxiii). The termination for default clause permitted the Government to terminate the contract in whole or in part under specified default circumstances without further liability under the contract to the contractor upon the giving of a specified notice of the character required. The termination for convenience of the Government clause provided in its initial paragraph as follows:

> "(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the contracting officer shall determine

that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective."

The balance of the clause provides for an administrative adjustment and determination of the amount to be paid by the Government requisite to compensate the contractor for actual losses resulting from total or partial termination, but specifically prohibited inclusion in such allowance of any compensation for loss of anticipated profits resulting from the partial or total termination; for full text of this clause see Finding of Fact No. 8 by Court of Claims (Appendix B, *infra*, page xxiv).

The two contracts were regularly extended at the end of each fiscal year through fiscal year 1959, and during this period the Government ordered its title certificates and title insurance requirements on tracts in the counties in question exclusively from Nesbitt; see Court of Claims' Finding of Fact 11 (Appendix B, *infra*, page xxxiii). In the last half of fiscal year 1959, the Government considerably increased its rate of order and, Nesbitt, although meeting and exceeding his minimum guaranteed rate of delivery, averaged during the period in question title certificate deliveries between .452 and 14.8 per week under the *Keystone Contract* and between 6.1 and 18.4 per week under the *Eufaula Contract*.

Shortly before the beginning of fiscal year 1960, on June 16, 1959, agents of the Government and Nesbitt conferred, and the Government indicated that its probable re-

quirements for fiscal year 1960 for preliminary title certificates would run at a minimum rate of around thirty (30) per week under each contract; see Court of Claims' Finding of Fact 13 (Appendix B, *infra*, page xxxiv). The Government endeavored to persuade Nesbitt to agree to voluntary written amendments of his Agreements to up his minimum guaranteed rate of preliminary title certificate delivery, where the rate of order placement so required, to a rate of 30 per week instead of 5 per week without additional compensation. Nesbitt would only agree to increase his minimum guaranteed rate to 10 per week without additional charge.

Two (2) other items of desired contract amendment were discussed and agreed to. The Government then announced that in view of Nesbitt's refusal to agree to a 30 per week minimum rate guaranty of delivery, the Government would, in order to permit it to fulfill its requirements, have to let bids to other suppliers. A few days later, however, the Government submitted to Nesbitt written amendments, which made no mention of any reservation on the part of the Government of a right to place orders elsewhere, but did expressly amend the contracts so as to increase Nesbitt's minimum guaranteed rate of delivery obligation to ten (10) per week and did contain the two other amendments specifically discussed and agreed upon. Upon the execution of these amendment agreements (see last three pages of Plaintiff's Exhibits 2 and 3, Original Record), the Government extended Nesbitt's contracts as amended for fiscal year 1960.

Although during fiscal years 1960 the Government placed a number of orders with Nesbitt under his contracts,

without advising Nesbitt thereof the Government also placed a large number of orders for the same material from another supplier (Findings of Fact 19, 20, 23 and 24 by the Court of Claims, Appendix B, *infra*, pages xxxvi-xxxix).

During fiscal year 1960, the Government's total requirements for title certificate material on tracts of land for the projects in question in the counties covered by Nesbitt's contracts constituted the title certificate and insurance material ordered by the Government from both Nesbitt and the other supplier (see Finding of Fact 25, by the Court of Claims, Appendix B, *infra*, page xxxix). Nesbitt during fiscal year 1960 was fully capable of performing his contract and providing the Government with its full requirements during fiscal year 1960 if all orders therefor had been placed with him (see Finding of Fact 26, Court of Claims, Appendix B, *infra*, page xl).

The Commissioner in his recommended Finding of Fact 27 (see Appendix B, *infra*, page xiv), found that Nesbitt would have realized a profit of $38,087.94 if Nesbitt had received all the orders diverted to the other supplier during fiscal year 1960. The Court of Claims in its Finding of Fact 27 (Appendix B, *infra*, page xl), notes that this item of profit, $38,087.94, was accepted by the Government who filed no exceptions to the Commissioner's report. The Court of Claims otherwise refused to consider this item because of its conclusion as a matter of law that Nesbitt was not entitled to recovery for loss of such anticipated profits in this case.

Nesbitt's theory of this case (see Plaintiff's Petition, R. 1), was that under the contracts Nesbitt was bound dur-

ing fiscal year 1960 to furnish the Government its full title certificates and title insurance requirements within the area and project limits specified in the contracts, whatever those requirements might in fact prove to be and that the Government was bound to order its full requirements in this regard exclusively from Nesbitt; that Nesbitt, where order placement required, was to deliver preliminary title certificates at reasonable rates commensurate with the Government's rate of order for requirements no matter how much in excess this rate of delivery might be over and above his minimum guaranteed rate of delivery.

The Government contended (see Answer, R. 34), that the contracts did not contain any express requirement binding the Government purchase its requirements exclusively from Nesbitt or expressly prohibit it from purchasing a portion of its requirements elsewhere.

Opinion of the Court of Claims

In its opinion (R. 188) (Appendix B, *infra*, page xvii), the Court of Claims assumes, for the purposes thereof, the correctness of Nesbitt's contention "that the contracts obligated the Government at all times, including the last year, to give all of its orders for title certificates and insurance (in the specified counties) to" Nesbitt. The Court of Claims found (Finding of Fact 7, Appendix B, *infra*, page xxiv), that in fiscal year 1960, the Government did not invoke the default provisions of the contracts. It also found (Finding of Fact 8, Appendix B, *infra*, page xxiv), that the Government also did not invoke the termination for convenience clause of the contracts.

In its opinion the Court of Claims pointed out that although the Government did not invoke the termination for convenience clause, it would have been justified in doing so in view of its estimated needs (June 16, 1959) of thirty to forty certificates per week and in view of Nesbitt's refusal to agree to an amendment increasing his minimum guaranteed rate of delivery obligation to that level. In its opinion the Court of Claims says:

> "* * * The defendant did not invoke this clause as it could have (see footnote 3, infra), but instead acted on the assumption (which plaintiff now challenges) that the contracts were not 'requirements' but 'indefinite quantities' agreement, allowing the Government to order elswhere at will. In comparable circumstances we have held that the failure of the defendant to invoke the convenience-termination article makes no difference, and that that clause nevertheless sets the limit to any possible recovery. *John Reiner & Co.* v. *United States*, Ct. Cl. No. 431-57, decided Dec. 13, 1963, 325 F.2d 438, *cert. denied*, 377 U.S. 931 (1964); *Brown & Son Electric Co.* v. *United States*, Ct. Cl. No. 76-61, decided Dec. 13, 1963, 325 F.2d 446. *Cf. Goldwasser* v. *United States*, Ct. Cl. No. 477-61, decided Dec. 13, 1963, 325 F.2d 722.
>
> "In *Reiner* and *Brown Electric*, the Government canceled the contracts, not under the termination article but because the Comptroller General had ruled them illegal. We held the contracts lawful but restricted the contractors to the amounts recoverable under the termination clause since that provision could properly have been invoked by the contracting officer. The justifications actually given for the cancellations were not valid, but 'a good ground did exist' for ending the contractors' performance 'in the far-reaching right to terminate under the termination article.' *John Reiner*

& Co., *supra*, slip op. at pp. 8-9, 325 F.2d at 443. *That adequate cause for cancellation cured the defective reason which prompted the defendant to act. A party to a contract may 'justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.' College Point Boat Corp.* v. *United States*, 267 U.S. 12, 16 (1925).

"The same principle applies here. Even though the two contracts be read to call upon the Government to fill all of its requirements through plaintiff's services, it cannot be denied that the Government had also reserved the right to terminate plaintiff's performance, either wholly or partially. If the contracting officer had accepted the agreements as 'requirements' contracts, he could still have satisfied his desire to place some orders elsewhere by invoking the right of partial termination, 'from time to time' if necessary, under the convenience-termination article. It follows that, even on plaintiff's view of the nature of the contracts, there was justifiable cause—the right to terminate—for what the defendant did. That justifiable cause 'operate(s) to curtail the damages recoverable' to those allowable upon a termination. See *College Point Boat Corp.* v. *United States, supra*, 267 U.S. at 16." (Italics ours.)

The Court's decision in the *Nesbitt* case is a radical step out or departure from the doctrine adhered to by this Court in the *College Point Boat Corp.* v. *United States*, 267 U.S. 12, case and also from the Court of Claims' own prior development of the *Reiner Doctrine*. The key factual element in this regard lies in the fact that throughout fiscal year 1960 Nesbitt remained bound under the terms of the

contracts to supply the Government with its full requirements thereunder. The Government never, throughout fiscal year 1960 communicated, in any form to Nesbitt the intelligence that, at any give point in time, Nesbitt, to any definable extent, was in any wise partially relieved of his performance obligations under the agreement.

As will be more definitely indicated hereafter, this Court's decision in *College Point Boat Corp.* v. *U. S.*, 267 U.S. 12, and the Court of Claims cases upon which the development of the *Reiner Doctrine* is dependent, all involve cases where for one reason or another contractors had been informed by the Government that at a particular point in time, rightly or wrongly, that their contracts had been totally suspended, terminated or cancelled. Unlike Nesbitt, they knew that they were relieved of any obligation for future performance under their contracts.

Genesis of the Development of the "Reiner Doctrine"

During World War I, Congress enacted the Act of June 15, 1917, c. 29, 40 Stat. 182. The decision of this Court in *Russell Motor Car* v. *United States*, 261 U.S. 514, decided April 9, 1923, established that this statute authorized the Government to suspend, cancel or terminate naval procurement contracts previously entered into by it at will and restricted contractors in such case to compensation awards based on the value of their contracts so cancelled, rather than to recovery of breach of contract damages inclusive, in proper cases, of loss of future profits. Prior to the date of this decision, the Government naval procurement agencies had not regarded this Statute as applicable to

contracts entered into with the Government as an original contracting party.

In the case of *College Point Boat Corp.* v. *United States*, 267 U.S. 12, the Government had entered into a contract for naval material a few days before the Armistice of November 11, 1918. Not knowing that it had the power to suspend, terminate or cancel under the Statute mentioned, a few weeks after the Armistice the Government directed the contractor to suspend all further operations under the contract simply to avoid useless production. No agreeable settlement as to compensation of the contractor having been reached, suit in which the contractor claimed, among other things, loss of future profits had pended for several years in the Court of Claims, when the Government on reading *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, formally notified contractor of cancellation under the Statute and invoked the statutory rule limiting damages. This Court in its decision in *College Point Boat Corp.* v. *United States*, 267 U.S. 12, at 15 and 16 states the well-established equitable rule as follows:

> "* * * A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for non-performance by him, although he was then ignorant of the fact. He may, likewise, justify an *asserted* termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later." (Italics ours.)

This rule normally applies where there has been effective notice of formal cancellation or termination based

on erroneous grounds to permit a belated justification of such termination in fact on the later discovery of valid grounds for such termination or cancellation existing at the time thereof.

In this case this Court recognizes that there had not been an actual communicated cancellation requisite under the Statute, but upholds the formal cancellation or termination under the Statute given several years later on the grounds that there could be no inequity from the late formal cancellation on grounds existing at the time of the suspension notice because no inequity could result therefrom under the circumstances of the case; the Court, noting that the suspension notice was also authorized by the Statute and the suspension notice had effectively prevented further operations on the part of the contractor and thus prevented any inequity in upholding the late formal cancellation, says at page 16 of the the U. S. Reporter:

> "* * * But the right to cancel was not lost by mere delay in exercising it; among other reasons, because the statute conferred upon the Government also the power to suspend the contract * * *."

This Court further says at page 17 of the U. S. Reporter:

> "* * * On December 6 it (the contractor) received from the Navy notice that the mats would probably not be needed. Neither these facts, nor any other found, render inequitable a delayed exercise of the right to cancel."

In recent years, and purportedly basing the same on *College Point Boat Corporation*, the Court of Claims has developed the so-called "Reiner Doctrine" in its decisions

in *Klein* v. *United States*, 285 F.2d 778 (1961); *Goldwasser* v. *United States* (December 13, 1963), 325 F.2d 722; *John Reiner & Co.* v. *United States*, Ct. Cl. (December 13, 1963), 325 F.2d 438, *cert. denied*, 377 U.S. 931 (1964); *Brown and Son Electric Co.* v. *United States*, Ct. Cl. (December 13, 1963), 325 F.2d 446. All of these decisions involved contracts containing "termination for default" and "termination for convenience" clauses virtually identical to those in the Nesbitt contracts.

In *Klein* v. *United States*, 285 F.2d 778, the Government terminated contractor's contract by express notice, but without specific reference to either clause, assigning grounds specifically indicative, however, of default. The majority opinion held that the contractor had been guilty of no default whatsoever and found that the termination constituted a breach of the contract by the Government and allowed recovery inclusive of loss of profits. There having been no effort at termination for convenience in fact at the time of the termination, the majority would allow no belated justification under the discretionary authority so to terminate. The majority also noted that the language of the "default" clause permitted the conversion of a termination, specifically under that clause, into a "termination for convenience" only when, at the time of termination, the contractor thereof, apparently in default, was excused from the operations of the default clause by the fact that his default was due to matters beyond his control. Minority opinions in this case urged that this Court's holding in *College Point Boat Corp.* allowed the Court of claims to treat the termination as one for convenience at least where, at the time of the communicated

notice of termination, grounds existed which would have kept such termination for convenience from being arbitrary if the Government had chosen at the time to terminate under the "convenience" clause.

In *Goldwasser* v. *United States*, 325 F.2d 722, the Government, claiming that the contract was not a full "requirement contract," had by formal communicated notice, advised the contractor that it would accept no further performance from him under the contract. The Court was unanimous in its opinion that the contract was a "requirements contract." The majority held that the termination was really on the grounds that the contractor was in default in his performance and that the contractor was not in fact in default. The majority opinion, again following *Klein*, held that *College Point Boat Corp.* was not authority for the proposition that a termination, actually on grounds of default could be converted into a termination for convenience simply by the reason of the existence of such a clause and because some reason could be perceived which would have justified a contracting officer's invoking of this clause if he had in fact chosen to do so. Special concurring opinions held that the only reason the "convenience" clause could not be used as a partial justification for the otherwise wrongful (but noticed) termination lay in the fact that again, as in *Klein*, the contractor was in fact not in anywise in default and the "default" clause prohibited the application of "termination of convenience" clause where this was the case.

On the same day as the *Goldwasser* decision, the Court of Claims handed down its decision in *John Reiner & Co.* v. *United States*, 325 F.2d 438, and the companion decision in

Brown & Son Electric Co. v. *United States*, 325 F.2d 446, which adopted the bulk of the *Reiner* decision by reference. In each of these decisions a few weeks after the contracts had been let in a manner obviously satisfactory to the contracting officer, the contracting officer had been advised by the Comptroller General's office and the General Accounting office that the manner in which these contracts had been let rendered the same illegal and void. Believing himself bound by the instructions from these agencies, the contracting officer gave formal notice of cancellation of the contracts on the grounds that the same had been illegally entered into and were accordingly void. The majority opinion in essence holds that *Goldwasser* and *Klein* are restricted only to cases where there has been an actual communicated termination for default where no default in fact existed and that any and all other communicated terminations or cancellations for any other reasons whatsoever were subject to belated justification, although such terminations would otherwise have been wrongful, on the strength of the mere presence in such contracts of the "termination for convenience" clause and where the Court of Claims could also perceive that at the time of such communicated termination a contracting office would have been justified (*i.e.*, would not have acted arbitrarily) in terminating the contract under the "convenience" clause if it had occurred to him to do so. One dissent still maintained that where the circumstances manifestly negatived any intention to terminate for convenience no such inference could be had.

Thus, all cases from *College Point Boat Corp.* v. *United States*, 267 U.S. 12, down to *John Reiner & Co.* v. *United*

States, 325 F.2d 438, were cases where the Government at a certain time had actually communicated to the contractor the intelligence that his contract was wholly suspended, terminated or cancelled. None of the cases involved situations where the Government allowed the contracts to remain to all intents and purposes in full force and effect as written, without any communication whatsoever of any intelligence which would have apprised the contractor at any time of the fact that his contracts were terminated in part.

Reasons for Granting Writ

The attempt by the Court of Claims below to apply to this, the Nesbitt, case, *College Point Boat Corp.* v. *United States*, 267 U.S. 12, and its so-called *Reiner Doctrine* would appear to be serious error. Accepting, as the Court did, plaintiff's contentions that the Government was bound to place its orders exclusively with Nesbitt, the Government's placement from time to time of orders with another supplier were simple breaches of the contract. The fact, time, nature or extent of these breaches was never communicated to Nesbitt.[1]

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[1] The Court of Claims in its opinion (Appendix B, *infra*, pp. xvi-xx) does not suggest that the threat by the Government during negotiations on June 16, 1959, to place a portion of its orders with other contractors in anywise constituted an attempted partial termination of Nesbitt's contracts. The factual circumstances, of course, forbade such a conclusion. Two days later the Government forwarded to Nesbitt written agreements increasing his performance obligations making no mention therein or otherwise of a reservation of a right to order from others. The Government manifestly wanted Nesbitt bound to meet their total requirements, he being then their sole supplier, and was never willing to permit the slightest reduction on Nesbitt's part of his obligations under the contract.

This Court in *College Point Boat Corp.*, and the Court of Claims in the precedent cases mentioned, dealt with cases where the contractor at a time certain was apprised of the Government's termination of his contract. The problem then became whether or not the Court would allow belated justification under the "termination for convenience" clause to relieve the Government of the consequences of what would otherwise have been an illegal termination and total breach of the contract.

The *Nesbitt* case did not present the question of whether a series of actual communicated partial terminations could be so dealt with. The Court of Claims sought to bring *College Point Boat Corp.* and its former decisions to bear by resort to legal fiction. Here the Court of Claims below held, regardless of the facts and as a matter of law, that since the Government, throughout fiscal year 1960, could have given a series of notices of partial termination of Nesbitt's contracts just prior to the placing of each diverted order, that the Government would, as a matter of law, be treated as having done so, and the legal consequences of the Government's breaches of its contracts thereby avoided.

The arbitrary character of the fiction so relied upon constitutes a conversion by judicial fiat of the "termination for convenience" clause into a contractual provision to the effect that a contractor is prohibited by contract from recovery as an element of damages loss of profits resulting from any and all breaches of its contracts by the Government.

It is submitted that the Government when it enters into a contract is subject to the same obligations that the law would prescribe with reference to a contract entered into by a private party. See *Lynch* v. *United States,* 292 U.S. 571; *Perry* v. *United States,* 294 U.S. 330. The enforceability of the Government's obligations are, of course, subject to limitations implicit in the Government consent to be sued. See the Act of June 25, 1948, c. 646, 62 Stat. 940, 28 U.S.C. 1491 (Appendix A, *infra,* page i), and similarly see the Act of March 3, 1887, as amended 24 Stat. 505, 28 U.S.C. 1346, known as the "Tucker Act" which appears to limit the enforceable obligations otherwise existing under contracts on the part of the Government to actions for recovery of money only. See *Bakewell* v. *United States,* 28 F.Supp. 504 (D.C. E.D. Mo. 1939), *aff'd* 110 F.2d 565 (8th Circuit 1940), *cert. den.* 310 U.S. 638 (1940). See also *United States* v. *Dismuke,* 76 F.2d 715 (5th Circuit 1935).

It is also submitted that, so far as private parties are concerned, where a contract contains a provision permitting one party thereto to terminate or cancel the contract at his option by giving notice prescribed in the contract, that until some actual notice reasonably conforming to the notice prescribed and required therein is given by such party, that such party's obligations under the contract remain in full force and he is liable for any and all breaches of the contract on his part occurring while such notice provisions remain uninvoked. See *Sylvan Crest Sand & Gravel Co.* v. *United States* (C.C.A.2d), 150 F.2d 642; *Star Chronicle Publishing Co.* v. *United Press Associations* (1913 C.C.A. 8th), 204 Fed. 217, *writ of error dismissed* 1914, 232 U.S. 714, *cert. den.* 232 U.S. 721; *Warrick* v. *McKnab's Estate,*

164 Kans. 78, 187 P.2d 502; *Carleno Coal Sales* v. *Ramsey Coal Co.*, 129 Colo. 393, 270 P.2d 755; *Elkhorn Consolidated Coal & Coke Co.* v. *Eaton Rhodes & Co.*, 163 Ky. 306, 173 S.W. 798; *Holmes Electric Protective Co.* v. *Goldstein*, 147 Pa. Super. 506, 24 A.2d 161; *Wright* v. *Bristol P. Leather Co.*, 257 Pa. 552, 101 Atl. 844.

This Court (and heretofore the Court of Claims) has long been committed to the proposition that the Government in the same manner as any other private individual is, where loss of profits is effectively proven as an element of damages, liable therefor where the same results from breaches of the contract on the part of the Government. See *United States* v. *Purcell Envelope Co.*, 249 U.S. 313; *United States* v. *Penn Foundry & Manufacturing Co.*, 337 U.S. 198; *United States* v. *Spearen*, 248 U.S. 132; *Needles for the Use of Needles* v. *United States*, 101 Ct. Cl. 535; *Broadbent Portable Laundries* v. *United States*, 56 Ct. Cl. 128.

As heretofore indicated, this Court denied certiorari in 1964 in *Reiner & Co.* v. *United States*, 325 F.2d 430, *cert. den.*, 377 U.S. 931. At that time the *Reiner* case and the doctrine for which it stood appeared to have extremely limited applicablity. By the terms of that and prior decisions the doctrine would apply only to government contracts where the Government had actually sought to terminate or cancel the contracts without express reliance on either the "termination for convenience" or "termination for default" clauses. Notwithstanding the myriads of government contracts containing such clauses, such incidents would presumably be relatively few.

Aside from this the *Nesbitt* case, the applicability of the *Reiner Doctrine* has been to some extent expanded in the following manner:

A. Effective July, 1962, the Government had amended its Regulations prescribing form of "termination for default" clauses in Armed Service Procurement (32 C.F.R. 8.707, 8.709, 8.710) and similarly amended its "termination for default" clauses in Public Contract Procurement (41 C.F.R. 1-8.701, 1-8.702, 1-8.703) so as to render companion "termination for convenience" clauses applicable even when the Government erroneously sought to terminate for contractor's default and there had, in fact, been no default at all. The object of these amendments was to obviate the exception to the *Reiner Doctrine* spelled out in *Klein* v. *United States,* 285 F.2d 778, and *Goldwasser* v. *United States,* 325 F.2d 722, expressly recognized and retained in force by the Court of Claims in *Reiner & Co.* v. *United States,* 325 F.2d 438, and *Brown & Son Electric Co.* v. *United States,* 325 F.2d 446.

B. The Court of Claims in its decision in *G. L. Christian & Associates* v. *United States,* 312 F.2d 418 and 320 F.2d 345, *cert. den.* (1963), 375 U.S. 954, made the *Reiner Doctrine* applicable to government contracts which did not include formal termination for convenience clauses where the inclusion of such clauses was required by appropriate government regulation, notwithstanding the absence of any statutory requirement for the inclusion thereof.

C. In *Coastal Cargo Company, Inc.* v. *U. S.,* Ct. Cl. (Oct. 15, 1965), 467-59, not yet officially reported (Appendix C, *infra,* page xli), the Court of Claims made the

Reiner Doctrine applicable where the contract contained any form of "termination for convenience" clause apparently utilized in the absence of any regulation requiring the inclusion of such clause therein and considerably different from standard form "termination for convenience" clauses.

The decision of the Court of Claims below in this, the *Nesbitt* case, however, not only erroneously applies and expands the *Reiner Doctrine*, but makes the same applicable to virtually any type of breach of contract by the Government that can be conceived. With the advent of this, the *Nesbitt* case, the *Reiner Doctrine* is no longer confined in its applicability to those rare incidents where the Government in communicating a notice of termination, cancellation or repudiation, fails to make specific reference either to the "termination for convenience" or "termination for default" clauses.

It is submitted that if, as here contended, the decision of the Court of Claims in this, the *Nesbitt* case, is erroneous, the precedent of this decision must of necessity profoundly affect a major portion of litigation of government contracts wherever loss of profits is an element of damage sought as a consequence of the Government's breaches of its contracts.

We cannot document with any exactitude the annual dollar volume[2] of government procurement contracts both

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[2] The grand total of the Government's administrative budget for contractual services and supplies for 1964 (actual) $47,216,000,000, for 1965 (estimate) is $49,253,000,000, and for 1966 (estimate) is $49,187,000,000. See excerpts from *Special Analysis On Obligations By Object*, "Budget For Fiscal Year 1966," Executive Office of the President, Bureau of the Budget, June 1965 (Appendix C, *infra*, p. li).

by the armed service branches of the Government and the general governmental branches which contain "termination for convenience" clauses in some form or other. While the inclusion of such clauses may not be universal,[3] such clauses have long been in broad use by the Government.[4]

It is believed that the Solicitor General's Office will concede that both in terms of dollar volume and in terms of number of contracts that at this time the great majority of all government contracts do contain "termination for convenience" clauses. If not, the Court is referred to the broad requirements for the inclusion of such clauses along with "termination for default" clauses under Armed Service Procurement Regulations,[5] and to similar regulations[6] governing public contract procurement.

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[3] As is suggested by Alan W. Mewett, "Formalities In Government Contracts", 5 Wayne Law Review 303, 309.

[4] MR. JUSTICE DOUGLAS in his dissenting opinion in *United States* v. *Penn Foundry & Manufacturing Co.*, 337 U.S. 198, 214, 215, notes the broad use of the "termination for convenience" clause introduced and made requisite during the later part of World War II in armed service, and more particularly in naval, contracts under Title 2, First War Powers Act, 201, 55 Stat. 838, 839, c. 593, 50 USCA; App'x Sec. 611.

[5] The pertinent current Armed Service Procurement Regulations issued under the authority of R.S. 161, Section 2202, 70A Stat. 120, 5 U.S.C. 22, 10 U.S.C. 2202, 70A Stat. 127-133; 10 U.S.C. 2301-2314, appear in 32 C.F.R. Section 8.000, 8.101-7, 8.101-11, Subpart B, 8.200, 8.201, 8. 202, Subpart F, 8.600, 8.601, 8.602, 8.602-1, 8.602-2, 8.603, 8.603-1, Subpart G, 8.700, 8.701, 8.702, 8.703, 8.704, 8.704-1, 8.705-2, 8.707, 8.708, 8.709, and 8.710.

[6] Pertinent regulations for Public Contract Procurement under authority of Section 205(C), 63 Stat. 390, 40 U.S.C. 486(C), appear in 41 CFR 1-8.000, Subpart 1-8.1, 1-8.101, (f), (6), Subpart 1-8.2, 1-8.200, 1-8.201, 1-8.202, Subpart 1-8.6, 1-8.600, 1-8.601, 1-8.602, 1-8.602-1, 1-8.602-2, (a), Subpart 1-8.7, 1-8.700, 1-8.700-1, 1-8.700-2, 1-8.701, 1-8.702, 1-8.703, 1-8.704, 1-8.704-1, 1-8.705, 1-8.705-1, 1-8.705-2, 1-8.707, 1-8.708, 1-8.709, 1-8.709-1, 1-8.709-2, 1-8.710.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 7, 1966

APPENDIX

APPENDIX A

United States Statutes Indirectly Involved:

Act of June 25, 1948, c. 91, 62 Stat. 940, § 1491:

§ 1491. Claims against United States generally.

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort.

APPENDIX B

Commissioner's finding of fact, opinion and judgment and findings of fact by the Court of Claims, and Order overruling Plaintiff's Motion for Rehearing and Alteration and Amendment of Judgment.

IN THE UNITED STATES COURT OF CLAIMS

No. 321-61

(Filed Dec. 10, 1963)

CHARLES R. NESBITT v. THE UNITED STATES

REPORT OF COMMISSIONER

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Plaintiff is a citizen of the United States, a resident of the State of Oklahoma, a lawyer and member of the bar of that state and a competent title attorney.

2. On November 29, 1956, plaintiff and defendant entered into a contract, No. DA-066-CIVENG-57-326, under the terms of which plaintiff was to furnish certificates of title and title insurance at a fixed rate of compensation on tracts of land in McIntosh County, Oklahoma, acquired by defendant for use in the construction of the Eufaula Dam and Reservoir project. The over-all term of the contract ran to June 30, 1961, but the contract was on a fiscal-year basis and would have terminated June 30, 1957, or on any subsequent June 30th of a fiscal year unless renewed by written notice

to that effect by defendant exclusively at its option. This contract hereafter will be referred to as the Eufaula contract.

3. On December 4, 1956, plaintiff and defendant entered into contract No. DA-34-066-CIVENG-57-329 under the terms of which plaintiff was to furnish certificates of title and title insurance at fixed rates of compensation on tracts of land in Creek, Osage and Pawnee Counties, Oklahoma, acquired by defendant for use in construction of the Keystone Dam and Reservoir project. The over-all term of this contract ran to June 30, 1961, but it was on a fiscal-year basis and would have terminated June 30, 1957, or any subsequent June 30th of a fiscal year unless renewed by written notice to that effect by defendant exclusively at its option. This will be referred to as the Keystone contract.

The Eufaula and the Keystone contracts were both renewed and extended in their original form for the fiscal years 1958 and 1959.

4. This is a suit for damages for alleged breach of the Eufaula and Keystone contracts by defendant. Plaintiff contends that under these contracts he was bound to furnish and defendant was bound to order from plaintiff all of the Government's requirements for title certificates and title insurance provided for in the agreements. Defendant allegedly breached these contracts during the fiscal year 1960, the last year in which they remained in force, by ordering some certificates and insurance from a supplier other than plaintiff. There was nothing in either contract by express language which obligated the defendant to purchase all of its requirements from plaintiff. Plaintiff alleges however, that this was the clear intent of the language imposing express and detailed obligations on plaintiff.

5. The two contracts are identical in form and the only difference between them is to be found in the continuation sheets. Thus, the Keystone contract provides different rates

of charge per preliminary certificate ordered in Creek ($63.50), Osage ($34.50), and Pawnee ($47.50) Counties and the Eufaula contract provides yet another rate ($49.50) for a preliminary certificate in McIntosh County. Continuation title certificates are $5 in all instances. Insurance rates are the same under both contracts.

The consideration for the Eufaula contract was stated to be approximately $104,000 and for the Keystone contract $149,937. These sums were arrived at by multiplying plaintiff's bid figures for the certificates and insurance by the total estimated ownerships shown on the continuation sheets. Estimated ownerships as shown in the contracts are set forth in the next finding.

6. The contract specifications provided, in part:

3. DELIVERY:

Certificates of title shall be completed and actually delivered to the party designated in the order. Deliveries shall be made in the order requested and at the rate of not less than five (5) certificates of title per week, provided orders for not less than that number are received weekly. The first delivery shall be made thirty (30) days from the date of the first order. It is anticipated the following number of certificates will be required from the counties and during the Fiscal Year indicated:

For the Keystone contract the estimates were:

County	Fiscal 1957	Fiscal 1958	Fiscal 1959	Fiscal 1960	Fiscal 1961
Creek	100	200	100	75	-------
Osage	100	200	150	50	-------
Pawnee	300	400	200	50	-------
	500	800	450	175	-------

For the Eufaula contract the estimates were:

County	Fiscal 1957	Fiscal 1958	Fiscal 1959	Fiscal 1960	Fiscal 1961
McIntosh	257	400	400	325	50

Subparagraph 2 of section I of the general specifications warns that the contracting officer may reduce or increase the total number of certificates of title to be ordered and delivered.

7. The general provisions of the contracts contained the following paragraphs:

11. DEFAULT

(a) The Government may * * * by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

* * * * * *

(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services simi-

lar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, *Provided,* That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

The default provisions of the contracts were not invoked by defendant.

8. Paragraph 24 of the general provisions of the contracts stated in part:

> 24. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT
>
> (a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the contracting officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

The defendant did not invoke the above provision of the contracts.

9. The certificates furnished by plaintiff were preliminary certificates, revised preliminary certificates, continuation certificates, final certificates and, occasionally, post-final certificates.

Preliminary certificates set forth the current ownership of a given tract, the encumbrances affecting the tract and the requirements for removal of any clouds or defects in the title. An insurance binder was issued with the preliminary certificate guaranteeing that plaintiff's insurance company

would insure the property at its actual value once properly acquired by the Government.

Revised preliminary certificates were issued in situations where the Government, having ascertained that the tract for which the original preliminary certificate was issued was too large or too small, required a revised description.

Continuation certificates were furnished on order of the Government when considerable time had elapsed since the date of issuance of the preliminary certificate and when its current status had to be known.

Final certificates were usually furnished after the Government had acquired title by purchase of a tract or had filed declaration of taking and instituted condemnation action. These certificates verified that all title requirements in the preliminary and continuation certificates had been met and that the title was free and clear of exceptions. This involved a title re-examination from the date of the last certificate down to date.

Post-final certificates were issued in those cases where the final certificates did not show the title free of requirements and where further steps had to be taken to clear any remaining objections to the title.

10. As a basis for preparation of title certificates it was necessary to make an examination of title records maintained in the office of the county clerk in each county where the land was located and to examine the tax records in the office of the county treasurer and the judgment records in the office of the court clerk. Sometimes plaintiff employed competent assistance, but at all times reserved to himself the approval in final form of the preliminary title certificates submitted to defendant. On request plaintiff also furnished defendant information as to whether proposed curative material, which was being obtained by defendant to correct title defects he had previously noted, would be

adequate as a basis for subsequent issuance of a final, post-final or continuation certificate.

11. Through the fiscal year 1959 defendant ordered from plaintiff all of its title-certificate and title-insurance requirements in McIntosh County with reference to the Eufaula Reservoir project and all of its requirements with reference to tracts of land in Creek, Osage and Pawnee Counties in connection with the Keystone project. In fiscal 1958 and 1959, under a T.O.D. (tract ownership data) contract, plaintiff furnished defendant certain supplemental services concerning tract descriptions. Plaintiff also had contracts with defendant. similar in form and purpose to Keystone and Eufaula contracts, for furnishing title certificates and insurance in Rogers County for the Oologah Reservoir project and for the extension of Fort Sill in Comanche County. The latter two contracts extended into fiscal year 1960 and had a bearing on plaintiff's capacity to perform the agreements here in issue during fiscal year 1960.

12. During the last half of the fiscal year 1959 defendant increased its rate and size of orders for preliminary title certificates and other title material in comparison with the rate of orders during the previous contract period. Orders were now in segments of 25 to 100 and plaintiff began to build a considerable backlog of unfilled orders, although continuing on the average to meet the minimum guarantee of five deliveries per week. During this period plaintiff's deliveries were between .452 and 14.8 per week under the Keystone contract and between 6.1 and 18.4 per week under the Eufaula contract. Some delay in deliveries was occasioned, which increased the backlog, because of defendant's instructions to plaintiff to give certain tract orders priority. Plaintiff's responsibilities in connection with other contracts mentioned in the finding above also had some effect in creating the backlog under the contracts in issue. Further, plaintiff was experiencing some difficulty in con-

nection with the examination of very complex titles in Creek County where mineral ownership and oil and gas leasehold interests had involved many conveyances or transfers.

13. In the latter part of fiscal year 1959 discussions and negotiations occurred between plaintiff and representatives of defendant about the growing backlog of unfilled orders. Negotiations were conducted primarily between plaintiff and Mr. David A. Helms, Chief of the Real Estate Division, U.S. Army Engineers, Tulsa, Oklahoma, representing defendant. Defendant desired that the contracts be changed to provide a guaranteed minimum rate of 30 instead of 5 per week in fiscal year 1960.

14. On June 16, 1959, Mr. Helms and his associate, Mr. Darwin L. Wilder, Chief of the Acquisition Branch, U.S. Army Engineers, Tulsa, met with plaintiff for the purpose of negotiating renewal of the Keystone and Eufaula contracts. At this conference the issues discussed were (a) renewal of the contracts; (b) an increase in the number of certificates to be furnished thereunder; (c) a time schedule for delivery of continuation and final certificates; and (d) a provision for means and a method for payment of insurance premiums on continuation certificates for those tracts of land acquired by condemnation.

15. Plaintiff objected to changing the agreements to provide a guaranteed minimum rate of 30 instead of 5 certificates per week under each contract, as such a change would involve increased overhead. Plaintiff indicated he would expect and require an additional price per tract under such a contract change. Plaintiff indicated also that he expected to be able to meet a rate of approximately 30 per week under existing contracts when the T.O.D. contracts were completed and the difficult oil titles were out of the way.

16. Defendant's representative informed plaintiff that defendant's requirements were not being met under the

contracts, that defendant estimated those requirements were 30 to 40 certificates per week, that while plaintiff was producing above the minimum requirements specified by the contracts plaintiff was delinquent on orders placed, and that it was defendant's intention to let the contracts lapse if plaintiff would not agree to an increase in the minimum rate as noted above. Defendant could not agree to any additional payments to plaintiff under the contracts for "expediting" deliveries. Plaintiff would not agree to defendant's suggested change without an increased price per unit.

17. Plaintiff agreed to an increase in his minimum guaranteed deliveries to 10 certificates per week per contract but defendant's representative told him that in order to fill defendant's requirements it would have to let bids to other suppliers. There is a conflict in the evidence as to whether plaintiff then asked leave to submit such bids or warned defendant that, in his opinion, it was breaching the contracts. At any event, plaintiff did not submit such bids and does assert a breach. Plaintiff advised defendant that he would continue to try to furnish defendant's requirements in excess of the minimum guarantee but would not contract to raise that guarantee when he did not think he could meet it without more compensation to obtain additional assistance.

18. Other matters were discussed at the conference on June 16, 1959, as noted in finding 14. As a result of negotiations, supplemental agreements were entered into, each bearing the date of June 23, 1959, and they were attached to the Keystone and Eufaula contracts as modifications thereof. In substance, the modifications, which are identical under each contract, provide that:

(a) Delivery of certificates of title would be made in the order requested and at the rate of not less than 10 per week, provided orders for not less than that number were received. This increase in the minimum guaranteed delivery was without additional compensation to plaintiff.

(b) Continuation certificates in various forms would be made by plaintiff within 45 days from date of order.

(c) Compensation for additional insurance premiums on continuation certificates of title would be paid on ownerships, which were placed in condemnation on a basis of the money deposited in condemnation proceedings, with additional insurance premiums to be paid on delivery of a final certificate in cases where a deficiency judgment was rendered.

(d) The supplemental agreements constituted an extension of the contract to and including June 30, 1960.

19. At the beginning of fiscal year 1960 plaintiff had a substantial number of orders for preliminary certificates on hand under both the Keystone and Eufaula contracts. Thereafter, in the latter part of the calendar year 1959, plaintiff received one or two additional large segment orders under the Keystone contract.

Under the Eufaula contract plaintiff received regular orders in segments of between 25 and 75 through the fall of 1959 and spring of 1960. He received virtually no orders under the Keystone contract during the last 6 months of fiscal year 1960 and very few under the Eufaula contract in the last quarter of fiscal year 1960.

20. During fiscal year 1960 plaintiff delivered under the Keystone contract the following preliminary certificates:

Osage County	26
Creek County	122
Pawnee County	407
	555

In fiscal year 1960 plaintiff delivered 747 preliminary certificates under the Eufaula contract.

21. In the fiscal year 1960 plaintiff delivered preliminary certificates under each of the two contracts here involved

in accordance with orders received from defendant at the monthly and weekly rates set forth in the table below:

	Plaintiff's Monthly Del. Rate (Keystone)			Plaintiff's Monthly Del. Rate (Eufaula)	Plaintiff's Weekly Del. Rate		
	Osage	Creek	Pawnee	McIntosh	Keystone	Eufaula	Both
July 1959	-------	30	1	40	7.00	9.04	16.2
Aug. 1959	-------	37	31	107	15.35	24.15	[1] 39.6
Sept. 1959	-------	45	74	131	27.7	30.5	[1] 55.6
Oct. 1959	-------	9	170	99	41.8	23.1	[1] 64.8
Nov. 1959	-------	-------	20	126	4.66	29.4	34.0
Dec. 1959	23	-------	31	49	23.4	11.05	34.5
Jan. 1960	-------	-------	15	62	3.39	14.00	17.4
Feb. 1960	3	-------	14	19	4.25	4.75	9.0
March 1960	-------	-------	1	45	.226	10.015	10.35
April 1960	-------	-------	----------	57	----------	12.9	12.9
May 1960	-------	1	----------	8	.226	1.7	2.0
June 1960	-------	-------	----------	4	----------	.9	.9

[1] Average of Aug., Sept., Oct. 1959—53.3 per week.

22. Plaintiff's full time was not devoted to the performance of the contracts in issue, as noted in finding 11. He was also engaged in the private practice of law, largely on a contingent-fee basis. He estimated that, during the period when he had a peak load of Government business under the contracts, he devoted about 50 percent of his time to private practice. In fiscal year 1960 plaintiff estimated that due to the decline in orders under the contracts, they required only about 25 percent of his time and that 75 percent of his time was devoted to private practice. His private practice was described as "flexible" and of a nature that permitted him to devote as little or as much time to it as he preferred. This circumstance thus had a bearing on his manner of handling defendant's contract work. On occasion he did all such work himself. At other times he used clerical assistance and on other occasions he employed lawyers to make independent examinations, subject to his approval. Clerical help was paid on a cash basis and other lawyers were paid 50 percent of plaintiff's contract rate. Plaintiff also had out-of-pocket expenses for travel and certain office overhead later referred to herein.

23. On August 14, 1959, defendant entered into the following contracts with the Title Insurance Corporation of St. Louis:

(a) Contract No. DA-34-066-CIVENG-60-39 requiring the furnishing of title certificates and title insurance for approximately 500 tract-ownerships of land situated in Osage County in connection with the Keystone Reservoir on a form similar to plaintiff's contracts. These certificates were estimated to cover land-acquisition cost to the Government of about $1,500,000.

(b) Contract No. DA-34-066-CIVENG-60-41 for certificates of title and insurance on approximately 400 ownerships of land in Creek County, Oklahoma, in connection with the Keystone project, based on an estimated land-acquisition cost to the Government of approximately $1,000,000.

(c) Contract No. DA-34-066-CIVENG-60-42 for the furnishing of such material on approximately 500 ownerships of land situated in Pawnee County, Oklahoma, in connection with the Keystone project, based on estimated land-acquisition cost to the Government of approximately $1,700,000.

(d) Contract No. DA-34-066-CIVENG-60-40 for the furnishing of such material on approximately 1000 ownership of land in McIntosh County in connection with the Eufaula Reservoir project.

24. Tabulated below are the certificates of all kinds ordered by defendant from the Title Insurance Corporation of St. Louis on tracts of land in Creek, Pawnee and Osage Counties in connection with the Keystone project and on tracts in McIntosh County in connection with the Eufaula project. Also shown are the preliminary certificates which, after original order, were cancelled or deleted by defendant.

[APPENDIX]

	Preliminary Certificates Ordered	Preliminary Certificates Deleted	Total Certificates
Keystone Reservoir Project:			
Creek County	114	* 6	3
Osage County	401	6	80
Pawnee County	396	0	58
Eufaula Reservoir Project:			
McIntosh County	375	21	49

*The six certificates classified as later deleted for Creek County were claimed by defendant to be so on the theory that if ordered from plaintiff rather than from the Title Insurance Corporation they would have constituted an order for continuation certificates as distinguished from preliminary certificates.

DAMAGES

25. Plaintiff claims that the orders placed by defendant for title certificates and insurance with the Title Insurance Corporation of St. Louis during fiscal year 1960 constitute a breach of his Keystone and Eufaula contracts, as amended June 23, 1959. The "total requirements" of defendant, during the fiscal year 1960 in connection with the two projects, are represented by the total of such certificate material and insurance placed with the Title Insurance Corporation under the three contracts applicable to Osage, Creek and Pawnee Counties and under the contract the corporation had for the same year with defendant for McIntosh County on the Eufaula project, plus the certificate and title material furnished by plaintiff under his two contracts with defendant.

26. Had the orders placed with the Title Insurance Corporation been placed with plaintiff he was fully capable of supplying all deliveries thereunder, although this would have required additional assistance of a legal and clerical nature for which he would have had additional overhead.

27. From the evidence presented, it is reasonable to conclude that had plaintiff been given the title work awarded to the Title Insurance Corporation he could have realized a profit of $38,187.94.

For determination of profit, both parties compared plaintiff's expenses to income during a 4-month period (July 1, 1959—October 31, 1959) to ascertain the cost ratio for application to the expected income on the title work awarded to the Title Insurance Corporation. Plaintiff contended the comparison should reflect his cost experience on all Government contracts wherein his over-all policy was to keep costs between 30 to 40 percent of his income. Plaintiff's comparison showed a cost ratio of 40.096 percent resulting in a net profit of $48,539.55 which plaintiff would have realized on the work awarded to the Title Insurance Corporation.

Further analysis, however, disclosed that plaintiff's cost ratios on the Eufaula and Keystone contracts during the 4-month period were 37.93 and 51.38 percent, respectively. Since said contracts cover the counties in which the work awarded to the Title Insurance Corporation was performed, it is reasonable to conclude that had plaintiff been given this additional work his cost ratio would have been that which he was then experiencing on the two contracts. Thus, it was found that had plaintiff been given the work awarded to the Title Insurance Corporation he would have realized a profit of $38,187.94.[1]

Respectfully submitted,

MARION T. BENNETT, *Commissioner.*

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[1] Defendant's audit, following the same contention, reflected cost ratios of 38.17 and 51.58 percent, respectively, on plaintiff's Eufaula and Keystone contracts, resulting in a profit of $38,066.29 on the work which was awarded to the Title Insurance Corporation. The difference in ratios is caused by the application of $794.52 to telephone, postage, and other office expenses of the Eufaula and Keystone contracts by defendant. The $794.52 is that amount of expenses applicable to all Government work engaged in by plaintiff. Since the income from the Eufaula and Keystone contracts ($39,734) during the 4-month period amounted to 89 percent of all income from Government work ($44,620.10), then only 89 percent of the office expenses, or $707.12, is to be applied in the computation of the Eufaula and Keystone cost ratios.

[APPENDIX]

IN THE UNITED STATES COURT OF CLAIMS

No. 321-61

(Decided May 14, 1965)

CHARLES R. NESBITT v. THE UNITED STATES

Granville Tomerlin for the plaintiff. *Tomerlin and High* of counsel.

John J. Cain, with whom was *Acting Assistant Attorney General J. Edward Williams*, for the defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:

In the fall of 1956 plaintiff, a well-known Oklahoma lawyer, made two contracts with the Corps of Engineers to furnish certificates of title and title insurance on tracts in certain Oklahoma counties acquired by the Federal Government for use in two dam-and-reservoir projects. Compensation was measured, at a fixed rate, by the number of certificates completed. The agreements ran until June 30, 1961, but the defendant could end them on June 30th of any prior year by failing to give written notice of renewal. This option of renewal was exercised each year through June 30, 1960, but not for the following year.

Plaintiff does not complain about the defendant's actions under the contracts during the years which ended on June 30th of 1957, 1958, and 1959. His charge is that, during the last year (1959-1960), the Government breached the agreements—which in his view bound the defendant to order all

of its certificate and insurance requirements for the specified lands from plaintiff—by obtaining some certificates and insurance from another source. He argues that, although the contracts did not expressly obligate the defendant to purchase all of its requirements from him, that was the clear aim of the detailed contractual provisions specifying what he and the Government were to do. The defendant contends, on the other hand, that from their inception the agreements were not "requirements" but pure "indefinite quantities" agreements, and that in any event plaintiff understood and impliedly agreed, as a result of discussions preceding the Government's exercise of its renewal option for the year ending June 30, 1960, that during that last period the Corps of Engineers would turn to other suppliers for some of its needs for title certificates and title insurance for the tracts involved in the two projects. This latter argument plaintiff counters by saying that the ultimate contract he was tendered and signed for 1959-1960 was, in its significant aspects, exactly the same as the agreements for the prior years and he therefore assumed, reasonably, that the Government had withdrawn its request to be allowed to go elsewhere for part of its requirements.

We need not resolve any of these disputed questions. For the purposes of our determination we can assume, without deciding, that the contracts obligated the Government at all times, including the last year, to give all of its orders for title certificates and insurance (in the specified counties) to plaintiff. Even so, there was in each contract a standard termination clause providing that "the performance of work under this contract may be terminated by the Government in accordance with this clause *in whole, or from time to time in part,* whenever the contracting officer shall determine that such termination is in the best interests of the Government". (finding 8, emphasis added). The defendant did not invoke this clause as it could have (see footnote 3, *infra*), but instead acted on the assumption

(which plaintiff now challenges) that the contracts were not "requirements" but "indefinite quantities" agreements, allowing the Government to order elsewhere at will.[1] In comparable circumstances we have held that the failure of the defendant to invoke the convenience-termination article makes no difference, and that that clause nevertheless sets the limit to any possible recovery. *John Reiner & Co.* v. *United States*, Ct. Cl., No. 431-57, decided Dec. 13, 1963, 325 F. 2d 438, *cert. denied*, 377 U.S. U.S. 931 (1964); *Brown & Son Electric Co.* v. *United States*, Ct. Cl., No. 76-61, decided Dec. 13, 1963, 325 F.2d 446. *Cf. Goldwasser* v. *United States*, Ct. Cl., No. 477-61, decided Dec. 13, 1963, 325 F. 2d 722.

In *Reiner* and *Brown Electric*, the Government canceled the contracts, not under the termination article but because the Comptroller General had ruled them illegal. We held the contracts lawful but restricted the contractors to the amounts recoverable under the termination clause since that provision could properly have been invoked by the contracting officer. The justifications actually given for the cancellations were not valid, but "a good ground did exist" for ending the contractors' performance "in the far-reaching right to terminate under the termination article." *John Reiner & Co., supra*, slip op. at pp. 8-9, 325 F. 2d at 443. That adequate cause for cancellation cured the defective reason which prompted the defendant to act. A party to a contract may "justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become

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[1]There is no suggestion that defendant thought that, in 1959-1960, plaintiff was in default under the contracts, or that it acted on such an assumption.

known to him until later." *College Point Boat Corp.* v. *United States*, 267 U.S. 12, 16 (1925).[2]

The same principle applies here. Even though the two contracts be read to call upon the Government to fill all of its requirements through plaintiff's services, it cannot be denied that the Government had also reserved the right to terminate plaintiff's performance, either wholly or partially. If the contracting officer had accepted the agreements as "requirements" contracts, he could still have satisfied his desire to place some orders elsewhere by invoking the right of partial termination, "from time to time" if necessary, under the convenience-termination article.[3] It follows that, even on plaintiff's view of the nature of the contracts, there was justifiable cause—the right to terminate—for what the defendant did. That justifiable cause "operate[s] to curtail the damages recoverable" to those

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[2]The court has applied a different rule where the defendant wrongly terminates the contract for the contractor's default. See *Klein* v. *United States*, 152 Ct. Cl. 8, 285 F. 2d 778 (1961); *Goldwasser* v. *United States*, *supra* (in which the majority of the court thought that the contract had been so terminated); *Litchfield Mfg. Corp.* v. *United States*, Ct. Cl., No. 453-56, decided Oct. 16, 1964, slip op., p. 4, fn. 9, 338 F. 2d 94, 96; *Dale Constr. Co.* v. *United States*, Ct. Cl., No. 134-57, decided Dec. 11, 1964, slip op., p. 26. The default rule is inapplicable here. See footnote 1, *supra*.

[3]The defendant was concerned about the backlog of its unfilled needs for title certificates and title insurance on the two projects (which was estimated to be between 30 and 40 certificates per week), and had discussed with plaintiff its demand for much greater production. Plaintiff, who did not devote full time to these contracts but had other government contracts and was also actively engaged in the private practice of law, refused to increase his minimum production as much as defendant asked, but did agree (for 1959-1960) to raise his minimum from 5 certificates a week to 10. This was still considerably less than defendant's requirements. In these circumstances, the contracting officer would undoubtedly have had the power, under the termination article, to exercise the Government's right to terminate the plaintiff's full rights, in order to be free to place orders with other suppliers. *John Reiner & Co.*, *supra*, slip op., pp. 6-7, 325 F. 2d at 442-43.

allowable upon a termination. See *College Point Boat Corp.* v. *United States, supra,* 267 U.S. at 16.

On a termination, plaintiff would be entitled, in general, to the unreimbursed costs of performance, but would have no claim to anticipated but unearned profits. *G. L. Christian & Associates* v. *United States,* 160 Ct. Cl. 1, 11, 15-17, 312 F. 2d 418, 423, 426-27, *cert. denied,* 375 U.S. 954 (1963); *J. W. Bateson Co.* v. *United States,* Ct. Cl., No. 365-60, decided July 12, 1963, slip op., pp. 3-4; *Brown & Son Electric Co.* v. *United States, supra,* slip op., p. 6, 325 F. 2d at 450; *Litchfield Mfg. Corp.* v. *United States, supra,* slip op., pp. 3-4 (incl. fn. 9), 8, 338 F. 2d at 96-97, 99. The barrier plaintiff cannot hurdle is that he has not proved, or sought to prove any such unreimbursed costs. Apparently, in performing under these contracts, he employed, from time to time, clerical assistance and lawyers who were paid hourly, per piece, or on some other similar basis so that when defendant decreased its orders to him in the latter part of the year 1959-1960 he could cut his expenses proportionately and did not continue to bear unreimbursed costs allocable to these government contracts.[4] His sole claim is for the profit he would have made if all of the Government's orders for 1959-1960 had been routed to him. That is a type of recovery to which he would clearly not be entitled on a convenience termination and, accordingly, to which he now has no right. Since he seeks nothing else, he cannot have any judgment.

The plaintiff is not entitled to recover and his petition is dismissed.

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[4] If plaintiff had obligated himself by hiring personnel or incurring overhead on a longer term basis, he could recover on partial termination such of those costs as remained unrecouped—assuming, of course, that his contract was a "requirements" agreement.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Marion T. Bennett, and the briefs and arguments of counsel, makes findings of fact as follows:

1. Plaintiff is a citizen of the United States, a resident of the State of Oklahoma, a lawyer and member of the bar of that state and a competent title attorney.

2. On November 29, 1956, plaintiff and defendant entered into a contract, No. DA-066-CIVENG-57-326, under the terms of which plaintiff was to furnish certificates of title and title insurance at a fixed rate of compensation on tracts of land in McIntosh County, Oklahoma, acquired by defendant for use in the construction of the Eufaula Dam and Reservoir project. The over-all term of the contract ran to June 30, 1961, but the contract was on a fiscal-year basis and would have terminated June 30, 1957, or on any subsequent June 30th of a fiscal year unless renewed by written notice to that effect by defendant exclusively at its option. This contract hereafter will be referred to as the Eufaula contract.

3. On December 4, 1956, plaintiff and defendant entered into a contract No. DA-34-066-CIVENG-57-329 under the terms of which plaintiff was to furnish certificates of title and title insurance at fixed rates of compensation on tracts of land in Creek, Osage and Pawnee Counties, Oklahoma, acquired by defendant for use in construction of the Keystone Dam and Reservoir project. The over-all term of this contract ran to June 30, 1961, but it was on a fiscal-year basis and would have terminated June 30, 1957, or any subsequent June 30th of a fiscal year unless renewed by written notice to that effect by defendant exclusively at its option. This will be referred to as the Keystone contract.

The Eufaula and the Keystone contracts were both renewed and extended in their original form for the fiscal years 1958 and 1959.

4. This is a suit for damages for alleged breach of the Eufaula and Keystone contracts by defendant. Plaintiff contends that under these contracts he was bound to furnish and defendant was bound to order from plaintiff all of the Government's requirements for title certificates and title insurance provided for in the agreements. Defendant allegedly breached these contracts during the fiscal year 1960, the last year in which they remained in force, by ordering some certificates and insurance from a supplier other than plaintiff. There was nothing in either contract by express language which obligated the defendant to purchase all of its requirements from plaintiff. Plaintiff alleges, however, that this was the clear intent of the language imposing express and detailed obligations on plaintiff.

5. The two contracts, on government bid forms, are identical in form and the only difference between them is to be found in the continuation sheets. Thus, the Keystone contract provides different rates of charge per preliminary certificate ordered in Creek ($63.50), Osage ($34.50), and Pawnee ($47.50) Counties and the Eufaula contract provides yet another rate ($49.50) for a preliminary certificate in McIntosh County. Continuation title certificates are $5 in all instances. Insurance rates are the same under both contracts. The bid form required the contractor "to furnish any and all of the items upon which the prices are quoted at the price set opposite each item."

The total consideration for the Eufaula contract was stated to be approximately $104,000 and for the Keystone contract $149,937. These sums were arrived at by multiplying plaintiff's bid figures for the certificates and insurance by the total estimated ownerships shown on the continuation sheets. Estimated ownerships as shown in the contracts are set forth in the next finding.

6. The contract specifications provided, in part:

3. DELIVERY:

Certificates of title shall be completed and actually delivered to the party designated in the order. Deliveries shall be made in the order requested and at the rate of not less than five (5) certificates of title per week, provided orders for not less than that number are received weekly. The first delivery shall be made thirty (30) days from the date of the first order. It is anticipated the following number of certificates will be required from the counties and during the Fiscal Year indicated :

For the Keystone contract the estimates were:

County	Fiscal 1957	Fiscal 1958	Fiscal 1959	Fiscal 1960	Fiscal 1961
Creek	100	200	100	75	
Osage	100	200	150	50	
Pawnee	300	400	200	50	
	500	800	450	175	

For the Eufaula contract the estimates were:

County	Fiscal 1957	Fiscal 1958	Fiscal 1959	Fiscal 1960	Fiscal 1961
McIntosh	257	400	400	325	50

Subparagraph 2 of section I of the general specifications warns that the contracting officer may reduce or increase the total number of certificates of title to be ordered and delivered.

7. The general provisions of the contracts contained the following paragraphs:

11. DEFAULT

(a) The Government may * * * by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

* * * * * *

(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

The default provisions of the contracts were not invoked by defendant.

8. Paragraph 24 of the general provisions of the contracts stated in part:

24. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the contracting officer shall determine that such termination is in the best interests of the Govern-

ment. Any such termination shall be effected by delivery to the contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the contracting officer, the contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Government, in the manner, at the time, and to the extent directed by the contracting officer, all of the right, title, and interest of the contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts; (5) settle all outstanding liabilities and all claims arising out of such termination or orders and subcontracts, with the approval or ratification of the contracting officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause; (6) transfer title and deliver to the Government, in the manner, at the time, and to the extent, if any, directed by the contracting officer, (i) the fabricated or unfabricated parts, work in process, completed work supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if the

contract had been completed, would have been required to be furnished to the Government; (7) use its best efforts to sell, in the manner, at the time, to the extent, and at the price or prices directed or authorized by the contracting officer, any property of the types referred to in provision (6) of this paragraph, *provided, however,* that the contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed by and at a price or prices approved by the contracting officer; and *provided further,* that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the contracting officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination and (9) take such action as may be necessary, or as the contracting officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the Government has or may acquire an interest. At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the contractor may submit to the contracting officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the dispostion of which has been directed or authorized by the contracting officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage

agreement covering the same, *provided,* that the list submitted shall be subject to verification by the contracting officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the contractor shall submit to the contracting officer its termination claim, in the form and with the certification prescribed by the contracting officer. Such claim shall be submitted promptly but in no event later than two years from the effective date of termination, unless one or more extensions in writing are granted by the contracting officer, upon request of the contractor made in writing within such two-year period or authorized extension thereof. However, if the contracting officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such two-year period or any extension thereof. Upon failure of the contractor to submit its termination claim within the time allowed, the contracting officer may determine, on the basis of information available to him, the amount, if any, due to the contractor by reason of the termination and shall thereupon pay to the contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the contractor and the contracting officer may agree upon the whole or any part of the amount or amounts to be paid to the contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done. The contract shall be amended accordingly, and the contractor shall be paid

the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the contractor in the event of failure of the contractor and the contracting officer to agree upon the whole amount to be paid to the contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount which may be agreed upon to be paid to the contractor pursuant to this paragraph (d).

(e) In the event of the failure of the contractor and contracting officer to agree as provided in paragraph (d) upon the whole amount to be paid to the contractor by reason of the termination of work pursuant to this clause, the contracting officer shall determine, on the basis of information available to him, the amount, if any, due to the contractor by reason of the termination and shall pay to the contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b)(7) above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges; (2) the total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(1) hereof.

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b)(5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on

account of supplies or materials delivered to services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (i) above).

(iii) A sum equal to 2% of that part of the amount determined under (1) which represents the cost of articles and materials not processed by the contractor, plus a sum equal to 8% of the remainder of such amount, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under subdivision (i) above, which amount for the purpose of this subdivision (iii) shall exclude any charges for interest on borrowings; *provided, however,* that if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract.

(3) The sum to be paid to the contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk

of loss, there shall be excluded from the amounts payable to the contractor as provided in paragraph (e) (1) and paragraph (e) (2) (i), the fair vlaue, as determined by the contracting officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (7).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the Statement of Principles for Consideration of Costs set forth in Part 4 of Section VIII of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(g) The contractor shall have the right of appeal, under the clause of this contract entitled "Disputes", from any determination made by the contracting officer under paragraphs (c) or (e) above, except that if the contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the contracting officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the contracting officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the contractor under this clause there shall be deducted (1) all unliquidated advance on other unliquidated payments on account theretofore made to the contractor, (2) any claim which the Government may have against the contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the

contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the contractor may file with the contracting officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the contractor in connection with the terminated portion of this contract whenever in the opinion of the contracting officer the aggregate of such payments shall be within the amount to which the contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the contractor's claim by reason of retention or other disposition of termination inventory until 10 days after the date of such retention or disposition.

(k) Unless otherwise provided for in this contract, or by applicable statute, the contractor, from the effective date of termination and for a period of six years

after final settlements under this contract, shall preserve and make available to the Government at all reasonable times, at the office of the contractor but without direct charge to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the contracting officer, photographs, micro-photographs, or other authentic reproductions thereof.

The defendant did not invoke the above provisions of the contracts.

9. The certificates furnished by plaintiff were preliminary certificates, revised preliminary certificates, continuation certificates, final certicates and, occasionally, post-final certificates.

Preliminary certificates set forth the current ownership of a given tract, the encumbrances affecting the tract and the requirements for removal of any clouds or defects in the title. An insurance binder was issued with the preliminary certificate guaranteeing that plaintiff's insurance company would insure the property at its actual value once properly acquired by the Government.

Revised preliminary certificates were issued in situations where the Government, having ascertained that the tract for which the original preliminary certificate was issued was too large or too small, required a revised description.

Continuation certificates were furnished on order of the Government when considerable time had elapsed since the date of issuance of the preliminary certificate and when its current status had to be known.

Final certificates were usually furnished after the Government had acquired title by purchase of a tract or had filed declaration of taking and instituted condemation ac-

tion. These certificates verified that all title requirements in the preliminary and continuation certificates had been met and that the title was free and clear of exceptions. This involved a title re-examination from the date of the last certificate down to date.

Post-final certificates were issued in those cases where the final certificates did not show the title free of requirements and where further steps had to be taken to clear any remaining objections to the title.

10. As a basis for preparation of title certificates it was necessary to make an examination of title records maintained in the office of the county clerk in each county where the land was located and to examine the tax records in the office of the county treasurer and the judgment records in the office of the court clerk. Sometimes plaintiff employed competent assistance, but at all times reserved to himself the approval in final form of the preliminary title certificates submitted to defendant. On request plaintiff also furnished defendant information as to whether proposed curative material, which was being obtained by defendant to correct title defects he had previously noted, would be adequate as a basis for subsequent issuance of a final, post-final or continuation certificate.

11. Through the fiscal year 1959 defendant ordered from plaintiff all of its title-certificate and title insurance requirements in McIntosh County with reference to the Eufaula Reservoir project and all of its requirements with reference to tracts of land in Creek, Osage and Pawnee Counties in connection with the Keystone project. In fiscal 1958 and 1959, under a T.O.D. (tract ownership data) contract, plaintiff furnished defendant certain supplemental services concerning tract descriptions. Plaintiff also had contracts with defendant, similar in form and purpose to the Keystone and Eufaula contracts, for furnishing title certificates and insurance in Rogers County for the Oologah Reservoir project and for the extension of Fort Sill in

Comanche County. The latter two contracts extended into fiscal year 1960 and had a bearing on plaintiff's capacity to perform the agreements here in issue during fiscal year 1960.

12. During the last half of the fiscal year 1959 defendant increased its rate and size of orders for preliminary title certificates and other title material in comparison with the rate of orders during the previous contract period. Orders were now in segments of 25 to 100 and plaintiff began to build a considerable backlog of unfilled orders, although continuing to meet the minimum guarantee of five deliveries per week where orders were sufficient to require that rate. During this period plaintiff's deliveries were between .452 and 14.8 per week under the Keystone contract and between 6.1 and 18.4 per week under the Eufaula contract. Some delay in deliveries was occasioned, which increased the backlog, because of defendant's instructions to plaintiff to give certain tract orders priority. Plaintiff's responsibilities in connection with other contracts mentioned in the finding above also had some effect in creating the backlog under the contracts in issue. Further, plaintiff was experiencing some difficulty in connection with the examination of very complex titles in Creek County where mineral ownership and oil and gas leasehold interests had involved many conveyances or transfers.

13. In the latter part of fiscal year 1959 discussions and negotiations occurred between plaintiff and representatives of defendant about the growing backlog of unfilled orders. Negotiations were conducted primarily between plaintiff and Mr. David A. Helms, Chief of the Real Estate Division, U.S. Army Engineers, Tulsa, Oklahoma, representing defendant. Defendant desired that the contracts be changed to provide a guaranteed minimum rate of 30 instead of 5 per week in fiscal year 1960.

14. On June 16, 1959, Mr. Helms and his associate, Mr. Darwin L. Wilder, Chief of the Acquisition Branch, U.S.

Army Engineers, Tulsa, met with plaintiff for the purpose of negotiating renewal of the Keystone and Eufaula contracts. At this conference the issues discussed were (a) renewal of the contracts; (b) an increase in the number of certificates to be furnished thereunder; (c) a time schedule for delivery of continuation and final certificates; and (d) a provision for means and a method for payment of insurance premiums on continuation certificates for those tracts of land acquired by condemnation.

15. Plaintiff objected to changing the agreements to provide a guaranteed minimum rate of 30 instead of 5 certificates per week under each contract, as such a change would involve increased overhead. Plaintiff indicated he would expect and require an additional price per tract under such a contract change. Plaintiff indicated also that he expected to be able to meet a rate of approximately 30 per week under existing contracts when the T.O.D. contracts were completed and the difficult oil titles were out of the way.

16. Defendant's representative informed plaintiff that defendant's requirements were not being met under the contracts, that defendant estimated those requirements were 30 to 40 certificates per week, that while plaintiff was producing above the minimum requirements specified by the contracts plaintiff was delinquent on orders placed, and that it was defendant's intention to let the contracts lapse if plaintiff would not agree to an increase in the minimum rate as noted above. Defendant could not agree to any additional payments to plaintiff under the contracts for "expediting" deliveries. Plaintiff would not agree to defendant's suggested change without an increased price per unit.

17. Plaintiff agreed to an increase in his minimum guaranteed deliveries to 10 certificates per week per contract but defendant's representative told him that in order to fill defendant's requirements it would have to let bids to other suppliers. There is a conflict in the evidence as to

whether plaintiff then asked leave to submit such bids or warned defendant that, in his opinion, it was breaching the contracts. At any event, plaintiff did not submit such bids and does assert a breach. Plaintiff advised defendant that he would continue to try to furnish defendant's requirements in excess of the minimum guarantee but would not contract to raise that guarantee when he did not think he could meet it without more compensation to obtain additional assistance.

18. Other matters were discussed at the conference on June 16, 1959, as noted in finding 14. As a result of negotiations, supplemental agreements were entered into, each bearing the date of June 23, 1959, and they were attached to the Keystone and Eufaula contracts as modifications thereof. In substance, the modifications, which are identical under each contract, provide that:

(a) Delivery of certificates of title would be made in the order requested and at the rate of not less than 10 per week, provided orders for not less than that number were received. This increase in the minimum guaranteed delivery was without additional compensation to plaintiff.

(b) Continuation certificates in various forms would be made by plaintiff within 45 days from date of order.

(c) Compensation for additional insurance premiums on continuation certificates of title would be paid on ownerships, which were placed in condemnation on a basis of the money deposited in condemnation proceedings, with additional insurance premiums to be paid on delivery of a final certificate in cases where a deficiency judgment was rendered.

(d) The supplemental agreements constituted an extension of the contract to and including June 30, 1960.

19. At the beginning of fiscal year 1960 plaintiff had a substantial number of orders for preliminary certificates on hand under both the Keystone and Eufaula contracts.

Thereafter, in the latter part of the calendar year 1959, plaintiff received one or two additional large segment orders under the Keystone contract.

Under the Eufaula contract plaintiff received regular orders in segments of between 25 and 75 through the fall of 1959 and spring of 1960. He received virtually no orders under the Keystone contract during the last 6 months of fiscal year 1960 and very few under the Eufaula contract in the last quarter of fiscal year 1960.

20. During fiscal year 1960 plaintiff delivered under the Keystone contract the following preliminary certificates:

Osage County	26
Creek County	122
Pawnee County	407
	555

In fiscal year 1960 plaintiff delivered 747 preliminary certificates under the Eufaula contract.

21. In the fiscal year 1960 plaintiff delivered preliminary certificates under each of the two contracts here involved in accordance with orders received from defendant at the monthly and weekly rates set forth in the table below:

	Plaintiff's Monthly Del. Rate (Keystone)			Plaintiff's Monthly Del. Rate (Eufaula)	Plaintiff's Weekly Del. Rate		
	Osage	Creek	Pawnee	McIntosh	Keystone	Eufaula	Both
July 1959	-------	30	1	40	7.69	9.04	16.2
Aug. 1959	-------	37	31	107	13.35	24.15	[1] 30.5
Sept. 1959	-------	45	74	131	27.7	30.5	[1] 55.6
Oct. 1959	-------	9	170	99	41.5	23.1	[1] 64.6
Nov. 1959	-------	-------	20	123	4.69	29.4	34.0
Dec. 1959	23	-------	81	49	22.4	11.05	34.5
Jan. 1960	-------	-------	15	62	2.30	14.99	17.4
Feb. 1960	3	-------	14	19	4.25	4.75	9.0
March 1960	-------	-------	1	45	.225	10.615	10.84
April 1960	-------	-------	-------	57	-------	12.9	12.9
May 1960	-------	1	-------	9	.225	1.7	2.0
June 1960	-------	-------	-------	4	-------	.9	.9

[1] Average of Aug., Sept., Oct. 1959—53.3 per week.

22. Plaintiff's full time was not devoted to the performance of the contracts in issue, as noted in finding 11. He

was also engaged in the private practice of law, largely on a contingent-fee basis. He estimated that, during the period when he had a peak load of Government business under the contracts, he devoted about 50 percent of his time to private practice. In fiscal year 1960 plaintiff estimated that due to the decline in orders under the contracts, they required only about 25 percent of his time and that 75 percent of his time was devoted to private practice. His private practice was described as "flexible" and of a nature that permitted him to devote as little or as much time to it as he preferred. This circumstance thus had a bearing on his manner of handling defendant's contract work. On occasion he did all such work himself. At other times he used clerical assistance and on other occasions he employed lawyers to make independent examinations, subject to his approval. Clerical help was paid on a cash basis and other lawyers were paid 50 percent of plaintiff's contract rate. Plaintiff also had out-of-pocket expenses for travel and certain office overhead later referred to herein.

23. On August 14, 1959, defendant entered into the following contracts with the Title Insurance Corporation of St. Louis:

(a) Contract No. DA-34-066-CIVENG-60-39 requiring the furnishing of title certificates and title insurance for approximately 500 tract-ownerships of land situated in Osage County in connection with the Keystone Reservoir on a form similar to plaintiff's contracts. These certificates were estimated to cover land-acquisition cost to the Government of about $1,500,000.

(b) Contract No. DA-34-066-CIVENG-60-41 for certificates of title and insurance on approximately 400 ownerships of land in Creek County, Oklahoma, in connection with the Keystone project, based on an estimated land-acquisition cost to the Government of approximately $1,000,000.

(c) Contract No. DA-34-066-CIVENG-60-42 for the furnishing of such material on approximately 500 ownerships of land situated in Pawnee County, Oklahoma, in connection with the Keystone project, based on estimated land-acquisition cost to the Government of approximately $1,700,000.

(d) Contract No. DA-34-066-CIVENG-60-40 for the furnishing of such material on approximately 1000 ownerships of land in McIntosh County in connection with the Eufaula Reservoir project.

24. Tabulated below are the certificates of all kinds ordered by defendant from the Title Insurance Corporation of St. Louis on tracts of land in Creek, Pawnee and Osage Counties in connection with the Keystone project and on tracts in McIntosh County in connection with the Eufaula project. Also shown are the preliminary certificates which, after original order, were cancelled or deleted by defendant.

	Preliminary Certificates Ordered	Preliminary Certificates Deleted	Total Certificates
Keystone Reservoir Project:			
Creek County	114	*6	3
Osage County	401	6	90
Pawnee County	396	0	58
Eufaula Reservoir Project:			
McIntosh County	375	21	49

*The six certificates classified as later deleted for Creek County were claimed by defendant to be so on the theory that if ordered from plaintiff rather than from the Title Insurance Corporation they would have constituted an order for continuation certificates as distinguished from preliminary certificates.

25. Plaintiff claims that the orders placed by defendant for title certificates and insurance with the Title Insurance Corporation of St. Louis during fiscal year 1960 constitute a breach of his Keystone and Eufaula contracts, as amended June 23, 1959. The "total requirements" of defendant, during the fiscal year 1960 in connection with the two projects, are represented by the total of such certificate material and insurance placed with the Title Insurance Corporation under the three contracts applicable to Osage, Creek and

Pawnee Counties and under the contract the corporation had for the same year with defendant for McIntosh County on the Eufaula project, plus the certificate and title material furnished by plaintiff under his two contracts with defendant.

26. Had the orders placed with the Title Insurance Corporation been placed with plaintiff he was fully capable of supplying all deliveries thereunder, although this would have required additional assistance of a legal and clerical nature for which he would have had additional overhead.

27. Plaintiff has not proved, or sought to prove, that he suffered any unreimbursed costs as a result of the defendant's actions under the two contracts during fiscal year 1960. Plaintiff has confined his claim to the profits he would have realized if he had been given the title work awarded to the Title Insurance Corporation. This sum he calculates at $46,497.73. The Trial Commissioner found that he would have realized a profit of $38,187.94 (a figure which the defendant accepts). In view of its disposition of the case, the court need not, and does not, resolve this issue.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law plaintiff is not entitled to recover and the petition is therefore dismissed.

IN THE UNITED STATES COURT OF CLAIMS

349-57	ACME PROCESS EQUIPMENT CO., ETC.	)	
420-57	JOHN HIX AWTRY	)	
274-59	NELLO L. TEER COMPANY	)	
357-59	FOOD MACHINERY AND CHEMICAL CORPORATION	)	
493-59	KENNECOTT COPPER CORPORATION	)	
46-60	HUGOTON PRODUCTION COMPANY	)	
398-60	IOWA SOUTHERN UTILITIES COMPANY	)	
192-61	FRANK CAMERO	)	
321-61	CHARLES R. NESBITT	)	V.
464-61	ANTHONY P. MILLER, INC.	)	THE
323-62	KARL F. KNETSCH AND EVA FAY KNETSCH	)	UNITED STATES
146-63	ARLEN DALE KEELING	)	
167-63	MORAN BROS., INC.	)	
314-63	JOHN J. HOLDEN	)	
43-64	JAMES EDGAR MOTTO	)	
142-64	JULIAN G. CARR	)	
376-64	FLORENCE W. OLESON, SURVIVING SPOUSE AND BENEFICIARY OF VICTOR L. OLESON, DECEASED	)	
10-65	OLIN MATHIESON CHEMICAL CORP.	)	

ORDER

These cases come before the court on motions and petitions for rehearing, reconsideration, relief from final judgment, modification of judgment, modification of opinion, motion for new trial and for further relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 15th day of October, 1965, that said motions be and the same are denied as follows:

349-57 Acme Process Equipment Co., etc. Defendant's motion.

420-57 John Hix Awtry. Plaintiff's motion.

274-59 Nello L. Teer Company. Plaintiff's motion.

357-59 Food Machinery and Chemical Corporation. Defendant's and plaintiff's motions.

493-59 Kennecott Copper Corporation. Defendant's motion.

46-60 Hugoton Production Company. Plaintiff's motion.

398-60 Iowa Southern Utilities Company. Defendant's motion.

192-61 Frank Camero. Plaintiff's motion.

321-61 Charles R. Nesbitt. Plaintiff's motions.

464-61 Anthony P. Miller, Inc. Plaintiff's motion.

323-62 Karl F. Knetsch and Eva Fay Knetsch. Plaintiff's motion.

146-63 Arlen Dale Keeling. Plaintiff's motion.

167-63 Moran Bros., Inc. Defendant's motion.

314-63 John J. Holden. Plaintiff's motion.

43-64 James Edgard Motto. Defendant's motion.

142-64 Julian G. Carr. Plaintiff's motion.

376-64 Florence W. Oleson, Surviving Spouse and Beneficiary of Victor L. Oleson, Deceased. Defendant's motion.

10-65 Olin Mathieson Chemical Corp. Defendant's petition.

BY THE COURT
Wilson Cowen
Chief Judge

Justice Reed (Ret.), sitting by designation, participated in the consideration and decision of case No. 46-60.

Senior Judge Jones participated in the consideration and decision of case Nos. 357-59 and 46-60.

Senior Judge Whitaker participated in the consideration and decision of case Nos. 274-59 and 323-62.

The Chief Judge took no part in the consideration and decision of case Nos. 46-60 and 323-62.

Judge Collins took no part in the consideration and decision of case Nos. 357-59 and 46-60.

APPENDIX C

The following opinion by the Court of Claims, rendered in pamphlet form October 15, 1965, does not appear, as yet, to be officially reported.

IN THE UNITED STATES COURT OF CLAIMS
No. 467-59

(Decided October 15, 1965)

COASTAL CARGO COMPANY, INC. v. THE UNITED STATES

Edward K. Wheeler, attorney of record, for plaintiff. *Burton K. Wheeler, Richard H. Strodel*, and *Wheeler & Wheeler*, of counsel.

R. W. Koskinen, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

[APPENDIX]

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

OPINION

COLLINS, *Judge*, delivered the opinion of the court:

The Department of the Air Force, in September 1958, awarded to plaintiff a contract for the transportation of passengers between Charleston, South Carolina, and Nouasseur, Morocco. Subsequently, after plaintiff had been performing for more than 2 months, the Air Force canceled the contract on the ground that the award to plaintiff had been invalid. In this action, plaintiff charges that the cancellation constituted a breach of contract; plaintiff seeks to recover its unreimbursed expenses and, in addition, anticipated profits.

The pertinent facts can be summarized as follows: On August 13, 1958, the Military Air Transport Service (hereinafter "MATS") issued invitations for bids regarding 13 items of airlift service. One of these items, No. 7, is involved in the present suit. Only "small business firms" were permitted to bid with regard to item 7. Finding 6, *infra*. The bid opening was held on September 4, 1958. Three firms submitted bids which were lower than plaintiff's. Before the contracting officer could make an award, he was required to obtain from the MATS Capability Survey Committee a recommendation as to the qualifications of the low bidders.

On September 11th, the committee issued a negative report as to each of the three lowest bidders. The contracting officer accepted the committee's recommendation that the three low bids be rejected. Moreover, the contracting officer stated that he had decided to (1) find that a condition of urgency existed, (2) issue a certificate to that effect, and (3) proceed with the procurement without referring the rejected bids to the Small Business Adminis-

tration.[1] Thereafter, it was determined that plaintiff was capable of providing the needed transportation. On September 18, 1958, the contracting officer notified plaintiff, by telegram, that it would be awarded the contract.

As a result of protests by the companies whose bids had been rejected, investigations were commenced by the Air Force and by the General Accounting Office (hereinafter the "GAO"). One alleged irregularity related to the preparation of the certificate of urgency. The investigations disclosed that the contracting officer had not executed the certificate until September 25, 1958, although he had dated it September 14, 1958.

On October 24, 1958, the GAO issued an opinion to the effect that (1) since the certificate of urgency was issued subject to the award of the contract to plaintiff, such cer-

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[1]The contracting officer was acting pursuant to Armed Services Procurement Regulations § 1-705.6 (revised June 11, 1958), as amended, 32 C.F.R. § 1.705-6 (1960), which provided, in part, as follows:

"(b) If a small business concern has submitted an otherwise acceptable bid or proposal but has been found by the contracting officer to be nonresponsible as to capacity or credit, and if the bid or proposal is to be rejected for this reason alone, (i) SBA shall be notified of the circumstances so as to permit it to issue a certificate of competency, and (ii) award shall be withheld pending either SBA issuance of a certificate of competency or the expiration of ten working days after SBA is so notified, whichever is earlier; subject to the following:

"(A) this procedure is mandatory *except* where the contracting officer certifies in writing that award must be made without delay and inserts in the contract file a statement signed by the contracting officer justifying the certificates;" (Emphasis supplied.)

Plaintiff suggests that, since bidding on item 7 was limited to "small business concerns," ASPR § 1-705.6 may not have been applicable to that item. Plaintiff notes that the purpose of the referral procedure is to assure that "small businesses" receive their fair share of Government contracts. Plaintiff's position is a reasonable one. However, in view of the decision which we reach, it is unnecessary for us to pass upon plaintiff's assertion.

tificate was invalid and (2) therefore, the low bidders were entitled to have their capacity judged by the Small Business Administration (hereinafter the "SBA"). On December 9, 1958, after the SBA had determined that Los Angeles Air Service, Inc. (hereinafter "Los Angeles"), the second lowest bidder, was qualified to perform, the GAO ruled that the rejection of the bid of Los Angeles had been erroneous. The GAO directed the cancellation of the award to plaintiff and this was accomplished on December 18, 1958. On the same date, the contract was awarded to Los Angeles.[2]

Upon receipt of the notice of cancellation, plaintiff ceased performance of the contract. Subsequently, plaintiff submitted a claim to the GAO. After the denial of its claim, plaintiff instituted the present suit.

The initial question is whether the award to plaintiff was invalid. Defendant contends that the contracting officer violated the applicable regulations when he failed to refer to the SBA the matter of the competency of Los Angeles and of the other low bidders. Therefore, according to defendant, the subsequent award of the contract to plaintiff was illegal. We do not agree with the assertions of defendant.

First, it must be noted that referral to the SBA was not required in *every* instance when the bid of a small business concern was rejected for lack of capacity or credit. The pertinent regulation, ASPR § 1-705.6, provided, in part, as follows:

> * * * this procedure [i.e, submission to the SBA] is mandatory *except* where the contracting officer certifies in writing that award must be made without delay and inserts in the contract file a statement signed by the contracting officer justifying the certificate; (Emphasis supplied.)

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[2]Various claims of Los Angeles, arising out of its contract, are the subject of *Trans International Airlines, Inc.* v. *United States.* Ct. Cl. No. 271-60 (Oct. 15, 1965).

Here, the contracting officer, acting in good faith, sought to come within the terms of this exception.[3]

Defendant argues that, at the time of the award, there was no need to proceed without delay. Thus, defendant asks us to declare that the contracting officer erred when he determined that a condition of urgency existed.[4] We can assume that, under appropriate circumstances, a court could overturn the decision of a contracting officer that an award must be made without delay. However, this is not a case where interference with the discretion of the contracting officer would be proper.

The rejection of the low bidders took place at the meeting held on September 10-11, 1958. Finding 12, *infra*. Thus, at that point, it became necessary for the contracting officer to determine whether to submit the matter to the SBA. In light of the existing conditions, we cannot say that the decision reached by the contracting officer was either unreasonable or improper.[5] For example, the Air Force de-

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[3]As indicated above, the fact which triggered the actions of the GAO (and ultimately the cancellation of plaintiff's award) was the failure of the contracting officer to prepare a certificate of urgency until after the award to plaintiff. This matter was not relied upon by defendant in its brief and oral argument. Furthermore, it is apparent that the time of execution of the certificate is not decisive. Here, the significant fact is that, before awarding the contract to plaintiff, the contracting officer *had determined* that the procurement must proceed without delay. Finding 12, *infra*.

[4]Regarding the matter of "urgency," defendant cites Armed Services Procurement Regulations dealing with the circumstances under which contracts may be negotiated, rather than procured through advertising. One such circumstance is when the supplies are needed because of a fire or flood. ASPR §§ 3-202.1-.2, as amended, 32 C.F.R. §§ 3.202-1, 3.202-2 (1965). We do not accept defendant's assertion that the cited regulations have relevance to the question at hand. The considerations pertinent to the dispensing with competitive bidding are not applicable here.

[5]The substance of the certificate issued by the contracting officer is contained in finding 23, *infra*.

sired the airlife service to begin by October 1, 1958, and this left a relatively short time for completing award of the contract and commencing performance. Therefore, we conclude that the contracting officer did comply with the regulations and that award of the contract to plaintiff was proper and valid. *Cf. John Reiner & Co. v. United States*, Ct. Cl. No. 431-57 (December 13, 1963), slip op. p. 3, 325 F. 2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964). It follows that plaintiff is entitled to recover.

As to the proper theory of recovery, our decision in *Reiner, supra*, is relevant. In *Reiner*, as in the present case, the plaintiff's contract was canceled as the result of a GAO ruling that the award was improper. We held that the award to Reiner was not void, but was lawful. Slip. op. p. 4. However, Reiner's recovery was limited to that provided for in the termination-for-convenience clause. Thus, there was no entitlement to such items as unearned anticipated profits. This court stated, slip. op. p. 8, the following:

> * * * The contracting officer on plaintiff's contract probably thought that he was cancelling the agreement for illegality. That excuse was not a valid justification as we now know, but just as in *College Point Boat Corp.* [267 U.S. 12 (1925)] a good ground did exist in the far-reaching right to terminate under the termination article. That justifiable cause controls the case and "operate[s] to curtail the damages recoverable" * * *.

The majority opinion went on to point out, slip. op. p. 9, that:

> Just as the failure to invoke the termination article leaves untouched the defendant's right to rely on the damage limitation of that clause, so the failure to follow the termination procedures of the Armed Services Procurement Regulations (ASPR) is ineffective to broaden plaintiff's rights of recovery. * * *

> Unless the contractor can show that he has been injured by the failure to pursue the ASPR procedures, such a lapse is immaterial to his recovery. * * *

We found that Reiner had not been hurt by the informal procedures and, as indicated, the judgment was restricted to the amount collectible on a termination for convenience.

With regard to the case at bar, we are bound by the reasoning of *John Reiner & Co.* v. *United States, supra.*[6] Here, as in *Reiner,* the Government may rely upon the termination-for-convenience clause despite the fact that the contracting officer did not invoke the clause. See also *Brown & Son Electric Co.* v. *United States,* Ct. Cl. No. 76-61 (December 13, 1963), slip op. p. 6, 325 F. 2d 446 (1963); *Nesbitt* v. *United States, supra,* footnote 6. Therefore, plaintiff's recovery is to be measured by the termination article.[7]

Determination of plaintiff's award can properly be accomplished in proceedings before our trial commissioner. In a case of this type, there is no requirement under the contract or under the Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1958), that the recovery be computed administratively (*i.e.,* within the Department of Defense).

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[6]In *John Reiner & Co.* v. *United States, supra,* slip op. p. 9, this court found it necessary to distinguish the following cases: *Goldwasser* v. *United States,* Ct. Cl. No. 477-61 (Dec. 13, 1963), 325 F. 2d 722 (1963); *Klein* v. *United States,* 152 Ct. Cl. 8, 285 F. 2d 778 (1961). According to the majority opinion in *Reiner,* the decisions in *Klein* and in *Goldwasser* should be limited (regarding this point) to holdings that "once the Government wrongfully terminates *for default* where there has been no default, it cannot thereafter seek to avoid liability by invoking a convenience termiation." (Emphasis supplied.) See *Nesbitt* v. *United States,* Ct. Cl. No. 321-61 (May 14, 1965), slip op. p. 3, 345 F. 2d 583 (1965); *Acme Process Equipment Co.* v. *United States,* Ct. Cl. No. 349-57 (June 11, 1965), slip op. p. 25, 347 F. 2d 509 (1965).

[7]The termination-for-convenience article involved in *Reiner* was the standard (pre-1962) clause. See finding 2 in *Reiner, supra,* slip op. p. 15. Coastal's contract contained not the standard clause, but a special one. Finding 49, *infra.* However, this distinction does not prevent the rationale of *Reiner* from being applicable here.

[APPENDIX]

Brown & Son Electric Co. v. *United States, supra,* slip op. p. 6. *Cf. Stein Bros. Mfg. Co.* v. *United States,* 162 Ct. Cl. 802, 808, 337 F. 2d 861 (1963).

In conclusion, we hold that plaintiff is entitled to recover an amount to be computed in accord with the termination-for-convenience article.[8] This amount will be determined in proceedings pursuant to Rule 47(c).

Defendant filed a counterclaim based upon the alleged illegality of plaintiff's contract. As indicated by the above opinion, there is no merit in the counterclaim and it is dismissed.

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[8]The report of the trial commissioner contained a number of findings regarding possible awards to plaintiff, including one dealing with "termination for convenience * * *." However, the latter finding was not based upon the particular termination-costs formula set forth in Coastal's contract. See finding 49, *infra.* For this reason, it will be necessary to determine, in Rule 47(c) proceedings, the proper amount of termination costs.

It should be noted that, at the oral argument, defendant withdrew its exception to the "termination-for-convenience" finding. Thus, defendant admitted that, if the court were to apply this theory, plaintiff would be entitled to receive $47,536.04 (the amount arrived at by the trial commissioner).

Excerpts from *Special Analysis on Obligations By Object*, "Budget for Fiscal Year 1966," Executive Office of the President, Bureau of the Budget, June 1965:

GRAND TOTAL

OBLIGATIONS BY OBJECT CLASS

(In millions of dollars)

DESCRIPTION	ADMINISTRATIVE BUDGET			TRUST FUNDS		
	1964 Actual	1965 Estimated	1966 Estimated	1964 Actual	1965 Estimated	1966 Estimated
• • • •	•	•	•	•	•	•
Contractual Services and Supplies.	(47,216)	(49,253)	(49,187)	(998)	(1,211)	(1,515)
21 Travel and transportation of persons	1,295	1,353	1,388	11	12	12
22 Transportation of things	2,947	2,932	2,889	9	17	19
23 Rent, communications, and utilities	1,884	1,974	2,295	43	44	45
24 Printing and reproduction	269	276	287	4	4	4
25 Other services	19,317	20,102	20,018	728	803	1,038
Services of other agencies	1,112	1,212	1,192	20	23	26
Payments to specified accounts	345	381	421	8	8	8
26 Supplies and materials	20,046	21,022	20,695	176	299	364
• • • •	•	•	•	•	•	•

[APPENDIX]

DEPARTMENT OF DEFENSE—MILITARY

OBLIGATIONS BY OBJECT CLASS

(In millions of dollars)

DESCRIPTION	ADMINISTRATIVE BUDGET			TRUST FUNDS		
	1964 Actual	1965 Estimated	1966 Estimated	1964 Actual	1965 Estimated	1966 Estimated
• • • •	•	•	•	•	•	•
Contractual Services and Supplies.	(29,600)	(29,788)	(29,613)	(5)	(5)	(5)
21 Travel and transportation of persons	931	948	955	•	•	•
22 Transportation of things	1,543	1,554	1,557	—	—	—
23 Rent, communications, and utilities	1,006	1,059	1,336	—	—	—
24 Printing and reproduction	107	112	117	•	•	•
25 Other services	11,708	11,351	11,054	•	•	•
Services of other agencies	638	657	695	—	—	—
Payments to specified accounts	•	•	•	—	—	—
26 Supplies and materials	13,667	14,107	13,898	5	5	5
• • • •	•	•	•	•	•	•

DEPARTMENT OF DEFENSE—CIVIL

OBLIGATIONS BY OBJECT CLASS

(In millions of dollars)

DESCRIPTION	ADMISTRATIVE BUDGET			TRUST FUNDS		
	1964 Actual	1965 Estimated	1966 Estimated	1964 Actual	1965 Estimated	1966 Estimated
• • • •	•	•	•	•	•	•
Contractual Services and Supplies.	(537)	(617)	(597)	(11)	(9)	(8)
21 Travel and transportation of persons	18	19	19	•	•	•
22 Transportation of things	4	5	5	•	•	•
23 Rent, communications, and utilities	9	10	9	•	•	•
24 Printing and reproduction	1	2	2	•	•	•
25 Other services	237	299	276	6	5	4
Services of other agencies	5	6	7	—	—	—
Payments to specified accounts	199	208	210	3	3	2
26 Supplies and materials	63	68	69	1	1	1
• • • •	•	•	•	•	•	•

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 904

CHARLES R. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. XVI–XX) is reported at 345 F. 2d 583.

JURISDICTION

The judgment of the Court of Claims was entered May 14, 1965. A timely motion for rehearing was denied on October 15, 1965. The petition for a writ of certiorari was filed on January 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the United States is liable for loss of anticipated profits upon breach of contracts contain-

206-796—66

ing a provision for termination when in the best interests of the government, where such provision was not invoked at the time of termination.

STATEMENT

Petitioner seeks review in this Court of a decision of the Court of Claims holding that the United States was not liable for unearned but anticipated profits upon partial cancellation of two contracts containing termination for the convenience of the government clauses even though such clauses were not expressly invoked at the time of cancellation. The contracts in question were entered into in 1956 by the Corps of Engineers and petitioner, a member of the Oklahoma bar. Under the contracts petitioner undertook to furnish certificates of title and title insurance on tracts of land which the federal government was acquiring in connection with two dam and reservoir projects. Petitioner was to be paid at a fixed rate per certificate and undertook to furnish not less than five certificates (subsequently increased to 10) per week provided that that many orders were placed by the government. The contract set forth estimates of the number of certificates that would be needed, but also specified that "the contracting officer may reduce or increase the total number of certificates of title to be ordered and delivered" (Pet. App. xxiii). The contract ran to June 30, 1961, but would terminate on any intervening June 30 unless the government exercised its option of renewal. The contracts also provided for termination "in whole, or from time to time in part, whenever the contracting officer shall

determine that such termination is in the best interests of the Government" (Pet. App. xxxv).

Through the end of fiscal year year 1959 the government ordered from petitioner all of the certificates needed in connection with the two projects. During the last half of fiscal year 1959 the government increased the rate at which it was ordering certificates, and a considerable backlog of unfilled orders began to accumulate although petitioner continued to supply the minimum of five per week specified in each contract.[1] In light of this backlog, in negotiations at the end of fiscal year 1959, the government urged petitioner to increase his rate of supply from five to 30 certificates per week. This petitioner refused to do without an increase in the price per certificate. Petitioner did agree to increase his minimum guaranteed deliveries to 10 certificates per week, and this change was adopted in both contracts for fiscal year 1960. However, the government informed petitioner that in order to fill its requirements it would have to accept bids from other suppliers (Pet. App. xxxv). In August 1959 the government entered into four contracts with a new supplier to fill its additional requirements for certificates in connection with the two projects.

Petitioner commenced this action in August 1961, claiming that it was a breach of contract for the gov-

[1] This increased rate of orders for certificates of title was necessary to permit the federal district court to disburse funds under 40 U.S.C. 258a *et seq.*, to persons who were being dispossessed of their lands in condemnation proceedings for the two projects.

ernment to place orders for certificates with any other supplier and that the contracts were intended to cover the "total requirements" of the government for certificates in connection with the two projects for fiscal year 1960, even though petitioner was obliged to supply no more than ten certificates per week under each contract. Petitioner did not seek to prove any unreimbursed costs as a consequence of the alleged breach, but confined his claim to the profits he would have realized had he received the orders which were placed elsewhere (Pet. App. xl). The Trial Commissioner and the Court of Claims found that "[t]here was nothing in either contract by express language which obligated the defendant to purchase all of its requirements from plaintiff" (Pet. App. iii, xxii), and the government "acted on the assumption * * * that the contracts were not 'requirements' but 'indefinite quantities' agreements, allowing the Government to order elsewhere at will" (Pet. App. xvii–xviii).

The Court of Claims found it unnecessary, however, to decide whether, under the two contracts, petitioner had been entitled to receive orders for the government's entire requirements in connection with the two projects. It held instead that petitioner's claim was untenable since, under the termination for the convenience of the government clause, the government was entitled to terminate the contracts "*in whole, or from time to time in part*" (Pet. App. xvii). Relying on the authority of *College Point Boat Co.* v. *United States*, 267 U.S. 12, the Court of Claims also held that, although the government had not invoked the ter-

mination for convenience clause (because it had acted on the assumption that the contracts were not requirements agreements), the clause "nevertheless sets the limit to any possible recovery" and precludes recovery of anticipated profits (Pet. App. xviii–xix).

ARGUMENT

The decision of the Court of Claims is correct. It is consistent with other decisions of that court and does not conflict with any decision of this Court. Consequently, further review is not warranted.

The decision of the Court of Claims makes it clear, and petitioner does not dispute, that the circumstances surrounding the performance under the contracts justified either a partial or total termination as being "in the best interests of the Government." The court below pointed out that the government was concerned about the backlog of its unfilled needs for title certificates and title insurance on the two projects, and had discussed with petitioner its requirement for much greater production (Pet. App. xix). Although petitioner raised his minimum from five certificates a week to 10, this was still considerably less than the government's stated requirements. As the Court of Claims found (Pet. App. xix, n. 3), "In these circumstances, the contracting officer would undoubtedly have had the power, under the termination article, to exercise the Government's right to terminate the plaintiff's full rights, in order to be free to place orders with other suppliers. *John Reiner & Co., supra,* * * *, 325 F. 2d at 442–43."

The foregoing circumstances clearly bring this case within the ambit of the Court's decision in *College Point Boat Co.* v. *United States*, 267 U.S. 12. In that case, the Navy took steps to halt production under a contract without exercising any right of termination reserved in the contract, and without knowledge that it had such authority under statute. There, as here, the Department "failed to give the notice requisite to terminate the contract" (267 U.S. at 15). This Court held that, although the stoppage of performance was an anticipatory breach, the Navy's right of cancellation precluded the recovery of prospective profits. And that was true even though the right of cancellation had not been invoked prior to the commencement of the suit (267 U.S. at 15–16):

> * * * A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later. * * *

In the present case, no less than in *College Point Boat Co.*, an adequate basis for termination existed in the termination for convenience clause; it could be asserted as a defense in petitioner's action for breach even on the assumption that it had not been invoked previously; and it "operated to curtail the damages recoverable" (267 U.S. at 16) to those authorized by the termination clause (Pet. App. xix–xx). See,

also, *John Reiner & Co.* v. *United States*, 325 F. 2d 438 (C. Cl.), certiorari denied, 377 U.S. 931.

Petitioner seeks to distinguish *College Point Boat Co.* and similar decisions on the ground that the government never notified petitioner that he was "to any definable extent * * * partially relieved of his performance obligations under the agreement" (Pet. 12). Petitioner overlooks the finding of the Commissioner and the Court of Claims that he was told by the government that "it would have to let bids to other suppliers" in order to fill its requirements (Pet. App. x, xxxv). Petitioner also overlooks the fact that his obligation under each agreement was limited to supplying 10 certificates per week in fiscal year 1960, that he delivered 1302 certificates in that year (Pet. App. xxxvii), and that he did not seek to prove that he had sustained any reimbursed costs pursuant to those obligations (Pet. App. xl).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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